Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control

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I. INTRODUCTION

In 1990, the Washington legislature enacted a number of laws designed to protect the community against sex offenders and to assist the victims of sex crimes.[1] By far the most controversial of these laws is a sexual psychopath law[2] that is unique in American history. Sexual psychopath laws authorize indeterminate commitment for treatment and control of sex offenders believed to suffer from a mental disease or disorder and thought to be dangerous. Although most states no longer

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1. The legislature passed a number of important laws relating to sex offenders. These provisions were enacted as part of the Community Protection Act, 1990 Wash. Laws ch. 3. Some of the key provisions are as follows: First, penalties for most sex crimes were increased by an average of 50%. *See* 1990 Wash. Laws ch. 3, §§ 701-702 (codified at WASH. REV. CODE §§ 9.94A.310 to -.320 (Supp. 1990-91)). Second, the period of postrelease supervision for certain sex offenders was extended. *Id.* §§ 301(3), 304(4) (codified at WASH. REV. CODE §§ 13.40.020(3), .210(4) (Supp. 1990-91)). Third, mandatory treatment for juvenile sex offenders was established. *Id.* § 302(5) (codified at WASH. REV. CODE § 13.40.160(5) (Supp. 1990-91)). Fourth, outpatient treatment for juveniles was made available as a sentencing option. *Id.* § 302(5)(b)(ii) (codified at WASH. REV. CODE § 13.40.160(5)(b)(ii) (Supp. 1990-91)). Fifth, convicted sex offenders were required to register with the police. *Id.* §§ 401-409 (codified at scattered sections of WASH. REV. CODE).

The legislature also enacted a number of programs to assist victims of sex crimes. For example, the Community Protection Act established a grant program for the provision of community-based treatment services for sex crimes victims. *Id.* §§ 1201-1210 (codified at WASH. REV. CODE §§ 43.280.010 to -.902 (Supp. 1990-91)). Finally, the Act established an office for a crime victims' advocate. *See id.* § 1202. Although the governor vetoed this latter part of the bill, he promulgated an executive order establishing the office. *See* "Governor's Explanation of Partial Veto" following 1990 Wash. Laws ch. 3.

2. WASH. REV. CODE ch. 71.09 (Supp. 1990-91).

utilize these laws, a majority of states, including Washington,[3] have used them in the past.[4]

The Washington law, however, is different from prior sexual psychopath laws in two fundamental respects. First, a person subject to commitment must serve his full prison term *before* he can be committed under this law. Thus, commitment is not in lieu of conviction and punishment; it is in addition to punishment.[5]

Second, the law does not require any allegation or proof of *recent* criminal wrongdoing, dangerous behavior, deteriorating mental state, or even inappropriate conduct before the state may seek possible lifetime confinement.[6] The prosecutor need only convince a judge or jury that the individual is a "sexually violent predator."[7] To accomplish this task, the government must show simply that the individual is a "person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."[8]

In sum, a single conviction for a qualifying sex crime at any time in the past, together with a mental health profes-

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3. WASH. REV. CODE ch. 71.06 (1989), *repealed prospectively by* 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).

4. *See generally* SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 739-40 (3d ed. 1985).

5. Under the Washington law, petitions for commitment may be sought for those who have served or are serving prison terms, those who have been found incompetent to stand trial, or those who have been found not guilty by reason of insanity. WASH. REV. CODE § 71.09.030 (Supp. 1990-91).

6. Only the District of Columbia permits commitment under its sexual psychopath law without a previous filing of a criminal charge. D.C. CODE ANN. § 22-3504(a) (1989). Prosecutors rarely invoke commitment under this law against unwilling defendants. Commitment is occasionally used with agreement of both the prosecutor and defendant in connection with a pending criminal charge and the law requires a guilty plea in such cases. Prosecutors virtually never use the law to commit someone who is living in the community and is not charged with a sex offense. Telephone interview with David L. Norman, Staff Attorney, Public Defender Service, Mental Health Division, St. Elizabeths Hosptial, Washington, D.C. (June 30, 1992).

7. *See* WASH. REV. CODE § 71.09.060(1) (Supp. 1990-91).

8. *Id.* § 71.09.020(1). For a more thorough description of proceedings under the statute, *see* Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 115-19 (1990). As discussed below, by not requiring recent evidence of dangerous behavior, the law increases the risk that experts will inaccurately predict that individuals are likely to commit crimes unless confined. The law also makes it virtually impossible for anyone who has committed a single qualifying sex crime to avoid commitment by obeying the law.

sional's purported diagnosis and prediction of "likely" reoffense at any time in the future, is legally sufficient[9] to incarcerate someone for the rest of his or her life in a psychiatric prison.[10]

This Article will demonstrate that the Washington legisla-

9. Both the Washington State Attorney General's Office and the King County Prosecuting Attorney's Office have adopted filing standards for deciding whether to seek commitment of any indiviudal as a sexually violent predator under the Washington law. Office of the Attorney General, Sexually Violent Predator Filing Standards, Final Draft (Dec. 18, 1990) (on file with the *University of Puget Sound Law Review*) [hereinafter Attorney General Standards]; Office of the Prosecuting Attorny, King County, Filing Standards, Washington Section 20 (on file with the *University of Puget Sound Law Review*) [hereinafter King County Standards]. Although the filing standards vary in minor details, they are substantially the same. The sections on filing considersations provide that normally, petitions are to be filed only when each of the enumerated circumstances have been satisfied. Several of these circumstances raise interesting questions.

Section IIIC of the Attorney General Standards specifies that a petition should be filed only if

> [t]he offender has a provable pattern of prior predatory acts; i.e. acts directed toward either (a) strangers or (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization. (Offender's declaration(s), if any, of intent to commit predatory acts in the future shall be considered in analyzing the pattern).

Attorney General Standards, *supra* at 5.

Because a "pattern" usually consists of two or more crimes, it appears that a petition will normally not be filed against an individual convicted of only a single crime.

Section IIIE provides "[n]ormally, a petition may not be filed if the offender has been released from custody for a substantial period of time, during which he has not engaged in any sex offenses or other activity indicating a continuation of the offender's predatory behavior." Attorney General Standards, *supra* at 5. This requirement seems to preclude filings against offenders living lawfully in the community for a "substantial period of time" unless recent evidence of dangerousness is available. Interestingly, the King County Prosecutor filed a petition against Vance Cunningham, who had been released from prison, living uneventfully in the community for four and one-half months. *See infra* notes 95-96 and accompany text.

Both of these provisions seem to significantly constrict the reach of the statute. While one might applaud some prosecuting authorities for narrowing the reach of the law and for requiring probative evidence of dangerousness, such discretionary restraint demonstrates the actual breadth of the statute. It appears that even prosecutors recognize the law's reach is hopelessly expansive.

Section IIID further provides that a petition may be filed when "[a] qualified mental health professional has determined that the offender (a) currently suffers from the requisite mental abnormality or personality disorder and (b) because of that mental condition the offender is likely to engage in predatory acts of sexual violence." Attorney General Standards, *supra* at 5. Unless this requirement is read carefully and in context, it might imply that such evaluation is based upon a clinical evaluation of the offender and his current psychological condition. Nothing could be further from the truth. In most cases, the mental health professional simply conducts a records review. This often involves nothing more than a review of an offender's official record of convictions. In any event, it is almost never based upon a clinical examination of the offender.

10. The Special Commitment Center is housed in the Monroe Reformatory in

ture deliberately chose to abuse the medical model of involuntary commitment for treatment in order to achieve lifetime preventive detention. In so doing, the legislature violated fundamental constitutional principles that underlie our system of social care and control and safeguard individual liberty.

To understand why Washington's sexual predator commitment law cannot be justified as a traditional sexual psychopath statute, this Article will first examine the history of sexual psychopath laws. Next, the Article will document the evolution in criminal justice ideologies that has resulted in the virtual disappearance of sexual psychopath laws from the American criminal justice system. This Article will then analyze how the process of law revision was animated by selective storytelling. The law is poetic; it works through narrative.[11] The process of law revision begins in a story and ends in a story; such stories provide communities with a shared sense of what has happened and a common vehicle for interpreting events.[12] This Article will argue that the narrative process spawning this statute told only one kind of story, while excluding other instructive stories that would have deepened our contextual understanding of the complex situation. The tales told soon acquired the power of myth.

Next, this Article will examine the predator commitment law in some detail. We will see that the legislature had few viable options available to achieve its primary purpose: keeping convicted sex offenders that were considered likely recidivists in custody beyond their lawful terms of imprisonment. The legislature ultimately chose to use the medical model of

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Monroe, Washington. It originally consisted of 36 beds that were once used to house the most psychiatrically disturbed prisoners in the Washington state prison system.

The author was one of the first lawyers to visit this center. From all outward appearances, it appeared to be a prison. The superintendent informed us that the guards were employed by the Department of Social and Health Services rather than the Department of Corrections. Evidently, government authorities believe that the formal employment status of the guards is important in characterizing the facility as a treatment facility rather than a prison.

As of this date, no permanent member of the staff, other than the superintendent who serves only in an administrative capacity and does not participate in any treatment programs, has any professional education, training, or experience in treating sex offenders. The staff is, in effect, learning "on the job." Treatment sessions evidently consist of approximately four hours a week in group sessions.

11. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168 (1985).

12. *Id.*

involuntary treatment to accomplish its purpose of indeterminate preventive detention.

Finally, this Article will demonstrate that this law revision process deliberately excluded balanced and reflective participation, responded only to the political passion and paradigm of the moment, and failed to build on objective expertise and knowledge. Such a process will produce laws that probably do more harm than good while wasting scarce resources.

II. HISTORICAL CONTEXT OF SEXUAL PSYCHOPATH LAWS

To understand why the Washington law is a deliberate misuse of the medical model of involuntary treatment for social control purposes, we need only examine the history of sexual psychopath laws in America. This history will show that these once popular laws have been rejected by almost every state, including Washington, because they were not based on sound medical knowledge, they conflicted with changing public values, and they were both ineffective and counterproductive. To compound matters, the new Washington law is an even more extreme version of sexual psychopath laws already abandoned by almost every state.

A. The Early History: The Rehabilitative Ideal and the Therapeutic State

Traditional sexual psychopath statutes authorize the involuntary commitment of individuals charged with or convicted of sex offenses and found to be mentally disordered and dangerous;[13] such individuals are committed to psychiatric facilities for control and treatment.[14] Minnesota was among the first of the states to enact a sexual psychopath law.[15] Its 1937 law

13. BRAKEL ET AL., *supra* note 4, at 740.

14. *Id.*

15. *See infra* note 16. Prior to the Minnesota law, Illinois enacted a sexual psychopath statute in 1938. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 302 (Frank T. Lindman & Donald M. McIntyre, Jr. eds., 1961) [hereinafter AMERICAN BAR FOUNDATION]. In 1937, Michigan had enacted a statute applicable to sexual psychopaths; however, the state supreme court invalidated this statute because it exposed defendants to double jeopardy and failed to provide a jury trial. *Id. See also* People v. Frontczak, 281 N.W. 534, 537 (Mich. 1938). Subsequently, in 1942, the Michigan Supreme Court upheld a similar civil commitment statute. *See* People v. Chapman, 4 N.W.2d 18, 28 (Mich. 1942).

Following the lead of Illinois and Michigan, the states of California, Massachusetts, Minnesota, Ohio and Wisconsin soon enacted sexual psychopath statutes. AMERICAN BAR FOUNDATION, *supra* note 15, at 303.

authorized the government to place a sex offender in a psychiatric institution for treatment rather than sending him or her to prison for punishment.[16]

By the late 1960's, well over half the states had enacted similar laws that provided indeterminate treatment for selected sex offenders.[17] These laws were generally divided into two major categories: (1) preconviction statutes that permitted the initiation of psychopathy proceedings after charging but before conviction of a sex crime, and (2) postconviction statutes that required conviction of a sex offense before psychopathy proceedings could be initiated.[18] Typically, an individual charged with or convicted of a sex offense could be found to be a sexual psychopath in a judicial proceeding; the person would then be hospitalized for control and treatment in a mental institution or treated in the community in lieu of imprisonment for punishment.[19] These laws have generally been upheld as a legitimate state exercise both of its police

16. The United States Supreme Court upheld the law against constitutional challenge in Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 277 (1940). The Minnesota law required the state to prove

> the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgement, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such a person *irresponsible* for his conduct with respect to sexual matters and thereby dangerous to other persons.

Id. at 272 (emphasis added).

In *Pearson*, the Supreme Court accepted the construction placed on this section by the Minnesota Supreme Court. The Minnesota court stated that the statute should "include those persons who, by an habitual course of misconduct in sexual matters, have evinced an utter lack of power to control their sexual impulses and . . . are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." *Id.*

In addition, the Minnesota law provided that, except as otherwise provided, the laws relating to "insane persons, or those alleged to be insane [i.e. civil commitment laws], shall apply with like force to persons having, or alleged to have, a psychopathic personality." *Id.* at 272. Thus, the Minnesota law required proof of a mental disorder that rendered an individual irresponsible for his sexual conduct and generally applied its civil commitment statute to sex offenders. The Minnesota scheme is thus properly characterized as involuntary civil commitment of the mentally disordered rather than as preventive detention.

17. *See* BRAKEL ET AL., *supra* note 4, at 739.

18. *Id.* at 740-41.

19. *Id.* at 345-46. A few states enacted special sentencing statutes that authorized courts to impose indeterminate prison terms on individuals convicted of certain sex crimes and considered dangerous. These statutes were enacted with the intent that treatment would be provided to these prisoners. *See, e.g.*, COLO. REV. STAT. ANN. §§ 39-19-1 to -10 (West 1963).

power to protect the public from future harm and of its *parens patriae* authority to treat those in need of treatment.

In 1971, Brakel and Rock aptly summarized the rationale of this "modern" legislation: "The statutes are premised upon the assumption that the relatively new science of psychiatry is able to identify, isolate, and treat" sexual psychopaths.[20] The Criminal Justice Mental Health Standards point out that:

> [this sort of] special dispositional legislation rest[s] on six assumptions: (1) there is a specific mental disability called sexual psychopathy . . . ; (2) persons suffering from such a disability are more likely to commit serious crimes, especially dangerous sex offenses, than normal criminals; (3) such persons are easily identified by mental health professionals; (4) the dangerousness of these offenders can be predicted by mental health professionals; (5) treatment is available for the condition; and (6) large numbers of persons afflicted with the designated disabilities can be cured.[21]

These statutes reflected the buoyant therapeutic optimism of that period.

As we shall soon see, rehabilitation of offenders emerged as the dominant ideology of 1960's and 1970's. Much criminal behavior was seen as caused by illness. Sexual deviancy, in particular, was considered specially susceptible to mental health treatment. Experts could identify and cure those sex offenders suffering from psychological pathology, permitting their release into society as productive and safe members. Both society and the individual would benefit by this benign application of medical expertise. The interest of the community in safety and the interest of the "patient" in cure could both be served simultaneously.[22]

B. The Later History: Responsibility and the Punitive State

By 1990, however, only a handful of states had sexual psychopath laws on the books.[23] A vast majority of states, includ-

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20. BRAKEL ET AL., *supra* note 4, at 341.

21. AMERICAN BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-8.1 at 457-8 (1989) [hereinafter ABA STANDARDS].

22. For an interesting historical analysis of this blending of cure and control in American penal history, *see generally* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).

23. *See, e.g.*, ILL. ANN. STAT. ch. 38, ¶ 105-1.01 to -12 (Smith-Hurd 1985 & Supp. 1991); D.C. CODE ANN. §§ 22-3503 to -3511 (1989 & Supp. 1990). Some states provided for indeterminate sentencing to a psychiatric facility rather than commitment in lieu

ing Washington[24] and California,[25] had repealed these laws either in their entirety or prospectively. Brakel explains why almost every state no longer resorts to involuntary commitment of sex offenders as an alternative to punishment:

> Growing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders has led such professional groups as the Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and, most recently, the American Bar Association Committee on Criminal Justice Mental Health Standards to urge that these laws be repealed.[26]

In sum, most experts and policy-makers had concluded that sex offenders were not mentally ill and that involuntary indeterminate treatment was ineffective in changing their criminal behavior. Coercive rehabilitation simply did not work.

Not surprisingly, most thoughtful law revision took this new knowledge into account. The Canadian Royal Commission on the Criminal Law Relating to Sexual Psychopaths concluded that sex offenders should be treated as criminals.[27] The California legislature repealed its Mentally Disordered Sex Offender legislation in 1981, declaring: "In repealing the mentally disordered sex offender commitment, the Legislature recognizes and declares that the commission of sex offenses is not

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of conviction and punishment. *See, e.g.*, COLO. REV. STAT. ANN. §§ 16-13-201 to -216 (West 1990 & Supp. 1991).

> [S]ince 1976, 13 states have repealed their [sexual psychopath] laws and another 12 have greatly modified them, the primary modification being to make treatment voluntary to the prisoners. In all, as of 1984, sexual psychopath laws exist in only 16 states and the District of Columbia. Of these jurisdictions, only 6 actually enforce the laws in more than isolated cases.

BRAKEL ET AL., *supra* note 4, at 740. "[In addition], today only five jurisdictions (sic) still permit indefinite confinement, and of these only one [Massachusetts] uses its law with any frequency." *Id.* at 741. The jurisdictions that currently allow indefinite commitment are as follows: COLO. REV. STAT. ANN. §§ 17-23-101 to -103 (West 1990 & Supp. 1991); D.C. CODE ANN. §§ 22-3501 to -3511 (1989 & Supp. 1991); ILL. ANN. STAT. ch. 38, §§ 105-1.01 to -12 (Smith-Hurd 1980 & Supp. 1991); MASS. ANN. LAWS ch. 123A (Law Co-op. 1986 & Supp. 1992); MINN. STAT. ANN. §§ 526.09 to -.11 (West 1975 & Supp. 1992); UTAH CODE ANN. §§ 77-16-1 to -5 (Michie 1990).

24. WASH. REV. CODE ch. 71.06 (1989), *repealed prospectively by* 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).

25. *See* 1981 Cal. Stat. ch. 928, § 4 at 3485.

26. BRAKEL ET AL., *supra* note 4, at 743.

27. ROYAL COMMISSION ON THE CRIMINAL LAW, REPORT ON THE CRIMINAL LAW RELATING TO CRIMINAL SEXUAL PSYCHOPATHS (1958).

itself the product of mental disease."[28]

Thus, the clear trend today is to punish sex offenders as responsible moral agents and to provide treatment to those who want it while they serve their prison terms. Washington adopted this strategy in 1984 when it abolished prospectively its sexual psychopath law[29] and provided treatment for qualifying sex offenders on a voluntary basis at the Twin Rivers Center.[30] Like most states, Washington concluded that involuntary treatment of sex offenders in lieu of punishment simply was not effective.

C. The Evolving Story of Sex Offenders: From Rehabilitation to Responsibility

This shift away from using the therapeutic model of commitment to treat sex offenders to the criminal justice model of punishing them can thus be seen as a story unfolding. When sexual psychopath laws were popular, the law told the optimistic story of a mentally ill sex offender who, if treated, could be rehabilitated and released safely into the community.

But the meaning of the story changed over time in light of new experiences. Policymakers were told a different sex offender story, and the significance of the story changed. As new empirical evidence emerged, the story told by sex offender legislation became less optimistic and increasingly fearful; according to these new stories, sex offenders choose their behavior and should be punished as responsible moral agents for their bad acts. The story changed from one about sickness to one about evil.

III. CHANGING IDEOLOGIES IN THE CRIMINAL JUSTICE SYSTEM

A. The Demise of the Rehabilitative Ideal

The wholesale repeal of sex offender commitment laws in the United States was consistent with ideological shifts in the American criminal justice system. Foremost among these shifts was the loss of confidence in what Frances Allen called

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28. 1981 Cal. Stat. ch. 928, § 4 at 3485.

29. WASH. REV. CODE ch. 71.06 (1989), *repealed prospectively by* 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).

30. WASH. REV. CODE § 9.94A.120(7)(b)(c) (Supp. 1990-91). The legislature also permitted a small group of first-time sex offenders to receive treatment in the community rather than serve a prison sentence. *Id.* § 9.94A.120(7)(a).

the "rehabilitative ideal."[31] The practice of punishment that emerged under this rehabilitative ideal emphasized treatment of the offender to change his underlying personality and to make him safe to be returned to society. Indeterminate sentencing was crucial to this schema. Experts needed time to assess and treat. Helping the individual criminal also helped society. Parole boards would not release prisoners if they were determined to still be dangerous. Under the rehabilitative model, both compassion for the offender and the convenience of society could be served at the same time.[32]

But the rehabilitative ideal came under scathing attacks from both the political left and right. Liberals and neoconservatives alike argued that society knew very little about the causes and cures for crime.[33] They also argued that experts could not accurately predict dangerousness. Increasingly, both the policy-makers and the public lost confidence in the ability of experts to change individual criminals for the better or to select which offenders were too dangerous to be released.[34]

Nationally, the victims' rights movement played a significant role in the abandonment of the rehabilitative ideal. These groups objected to the mischaracterization of criminals as "patients" who needed treatment. Not only did a therapeutic

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31. Allen described the assumptions of the rehabilitative ideal as follows:

> It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, and of primary significance for the purposes at hand, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interest of his own happiness, health, and satisfactions and in the interest of social defense.

Francis A. Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 226 (1959).

32. *See* ROTHMAN, *supra* note 22, at 43-81. For a full discussion of how the original progressive era ethos of punishment has evolved in America since the early 1900's, *see* JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES (1992) [hereinafter LA FOND & DURHAM, BACK TO THE ASYLUM].

33. For a liberal critique of rehabilitation, *see* THE AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 40-47 (1st ed. 1971) [hereinafter STRUGGLE FOR JUSTICE]. For a neoconservative critique, *see* ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 184-91 (1975).

34. For a thorough review of this change in ideology, *see* LA FOND & DURHAM, BACK TO THE ASYLUM, *supra* note 32.

ideology obscure the serious physical and psychological harm done to victims of violent crime, it also communicated the wrong message: offenders were not at fault; rather, they merely had broken personalities that needed repair.[35]

B. The Reemergence of Responsibility and Retribution

As a consequence of attacks on the rehabilitative model, the retributive theory of punishment, which punishes an individual for what he did rather than who he is or might become, has emerged as the dominant theory of criminal justice.[36] This canon became known popularly as the "just deserts" model of punishment. Offenders are now considered moral agents who choose to commit crime and, consequently, are responsible for their actions. Punishment is inflicted as a response to past behavior and is justified as of the moment it is imposed. It is not justified by contingent future consequences which are virtually unknown and unknowable.[37]

To implement the just deserts ideology, a number of states, including Washington in 1984,[38] adopted determinate sentencing.[39] Rather than sentencing criminals to indeterminate prison terms that effectively conferred broad sentencing discretion on judges and parole boards, many states enacted determinate sentencing schemes that computed presumptive sentences based on the crime committed and the offender's past criminal record.[40]

C. Criticisms of Indeterminate Sentencing

Liberals criticized indeterminate sentencing because it conferred too much unguided discretion on unaccountable bureaucrats and because it inevitably generated unequal treatment among offenders and usually led to excessive prison terms.[41] Neoconservatives also disliked indeterminate sentenc-

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35. *See generally id.*

36. *See* VAN DEN HAAG, *supra* note 33, at 8-23 for a forceful exposition of this ideology.

37. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978).

38. WASH. REV. CODE ch. 9.94A (Supp. 1990-91).

39. At least ten states have adopted some form of determinate sentencing: California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, North Carolina, and Washington. MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, SENTENCING REFORM IMPACTS 77 (1987).

40. *See supra* note 39.

41. *See generally* STRUGGLE FOR JUSTICE, *supra* note 33; ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1st ed. 1976). *See also* DAVID BOERNER,

ing.[42] In their view, rehabilitation implemented through indeterminate sentencing embodied a view of human action that was normatively wrong and empirically false: namely, that socioeconomic conditions and individual pathology prevent humans from exercising free will.[43] Neoconservatives argued that humans do have free will and that offenders deserve to be punished for what they have willfully done. Determinate sentencing would set the socially appropriate penalty one must pay for deliberately breaking the law.

Ironically, critics on both the political left and right agreed that indeterminate sentencing was a failure. Many on both sides also agreed, for different reasons, that determinate sentencing was the answer.[44] Liberals and neoconservatives disagreed, however, on the scale of punishments that should be enacted in a determinate sentencing scheme. Liberals wanted a deflated schedule of penalties based on the principle of parsimony rather than prison terms of long duration.[45] Neoconservatives, on the other hand, wanted longer prison terms that emphasized both punishment for wrongs done and extended incapacitation to protect the community.[46]

In 1984, the Washington legislature agreed that determinate sentencing was preferable social policy and enacted a determinate sentencing law.[47] In general, Washington provided relatively light sentences for serious sex offenders, especially repeat offenders.[48] Thus, liberal ideology prevailed in setting the presumptive sentences for sex crimes.[49]

SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 (1985).

42. For a discussion of neoconservativism and its influence during the past decade, *see* LA FOND & DURHAM, BACK TO THE ASYLUM, *supra* note 32.

43. For a more thorough discussion of the neoconservative reaction to the criminology of the 1960's and 1970's, *see id.*

44. *See* STRUGGLE FOR JUSTICE, *supra* note 33 at 124-25; VON HIRSCH, *supra* note 41, at 98-106.

45. Charles E. Goodell, *Preface* to VON HIRSCH, *supra* note 41, at xviii-xix.

46. *See* VAN DEN HAAG, *supra* note 33, at 53-55.

47. 1981 Wash. Laws ch. 137 (codified at scattered sections of WASH. REV. CODE (law became effective in 1984). *See also* WASH. REV. CODE § 9.94A.905 (1989).

48. For example, the 1984 Sentencing Reform Act set the presumptive penalty for first degree rape at five years. *See* WASH. REV. CODE § 9.94A.310-.320 (Supp. 1990-91). In 1988, the legislature increased the higher ranges for most sex offenses. GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, DEP'T OF SOCIAL AND HEALTH SERVICES, FINAL REPORT II-6 (1989) [hereinafter TASK FORCE REPORT].

49. A special committee appointed by the legislature to recommend prison terms under Washington's 1984 determinate sentencing law very nearly recommended that most prison terms for any offense should not exceed two years. Evidently, a majority

D. Dismantling Sexual Psychopath Laws

As ideologies shifted, sexual psychopath laws came under special attack. Increasingly, experts concluded that sex offenders were not sick in any clinical sense.[50] Rather, most sex offenders committed crimes for the same reasons that other offenders commit crimes; their motivation for deviant behavior may derive from an expression of anger, a desire to control, or self-gratification.[51] Many sex offenders are simply antisocial individuals. Others are situational offenders; they will offend only if they find themselves in a situation that is conducive to committing a crime. Factors associated with these instances of crime include financial, marital, or other stress combined with an opportunistic setting.[52] In short, it is impossible in most cases to generalize a causal connection between any particular psychological condition and the commission of sex crimes.[53]

Further, no clear evidence suggests that sex offenders as a group are more likely to reoffend than other criminals. In a study of all state prisoners released in 1983, researchers found that rapists had lower recidivism rates, as measured by rearrest, than kidnappers, robbers, and persons who had committed assault.[54] Thus, sexual psychopath laws could not be justified as a necessary response to offenders who are particularly dangerous.

Serious doubt also existed about the efficacy of sex offender treatment programs. Most attempts to measure treatment efficacy have relied on detecting recidivism among

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of this committee concluded that any time beyond two years was excessive and therefore counterproductive. This prison term limit would not have applied to dangerous violent offenders. Ultimately, the committee could not agree on this recommendation. Telephone interview with Robert Boruchowitz, committee member (April 27, 1992).

50. Of course, some sex offenders are also mentally ill. But the commission of sex offenses does not establish mental illness. 4 ENCYCLOPAEDIA OF CRIME & JUSTICE 1487 (1983).

51. *Id.* at 1486.

52. *Id.* at 1489-90.

53. This generalization has some exceptions. Pedophiles or individuals whose sexual desires are focused on children are considered by some experts to suffer from a mental condition that in some sense may cause their deviant behavior. *See* AMERICAN PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) 284-85 (3d ed. rev. 1987) [hereinafter DSM-III-R].

54. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1983 at 5 (1989). Recidivism rates are extremely difficult to ascertain because most measurements rely on formal contact with the criminal justice system or on self-reporting. Measurement difficulties, of course, tend to be constant for all types of criminal offenders.

patients who had received treatment in various programs. Comprehensive reviews of sex offender treatment programs, both voluntary and involuntary, reported a wide range of treatment effectiveness.[55]

The authors of the most comprehensive and current review of treatment programs for sex offenders reviewed the criminal and psychological literature on sex offender treatment programs. They selected 42 studies involving almost 7000 men. Some of their findings are startling. For example, eight of the nine studies of *untreated* offenders reflected relatively low recidivism rates, all below 12%. In contrast, two thirds of *treated* offender studies reflected recidivism rates *higher* than 12%.[56] The authors concluded: (1) ". . . we can at least say with confidence that there is *no evidence* that treatment *effectively* reduces sex offense recidivism;" and (2) "Thus, we must conclude that there is no data at present for assessing the relative *effectiveness* of treatment for *different types* of offenders."[57]

A major legislative study on the sexual psychopath program in Washington confirmed the skeptics' view that these programs did not work.[58] In 1985, the Washington State Legislative Budget Committee audited Washington State's sex offender treatment programs and found that, in spite of the highly selected population participating in these programs at Eastern and Western State Hospitals, the recidivism rate by those offenders who actually completed the program was about the same as those incarcerated without treatment.[59] Stuart Scheingold persuasively demonstrates that the most thorough studies fail to establish that treatment of sex offenders is effective in reducing subsequent crimes committed by these

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55. *See* Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 33-4 (1989).

56. *Id.* at 24.

57. *Id.* at 25. For a more thorough discussion *see* John Q. La Fond and James L. Reardon, Sex Offender Treatment Laws in the United States: Past, Present, and Future, paper presented at the XVIIIth International Congress on Law and Mental Health, Vancouver, B.C., Canada (June 23-27, 1992) (on file with the *U. Puget Sound L. Rev.*).

58. *See* Sex Offender Programs at Western and Eastern State Hospitals, Dep't of Social and Health Services, Report No. 85-16 (December 13, 1985) (reporting to the Washington State Legislature).

59. *Id.* at 6, 49-58. Recidivism rates were reported only for those offenders who successfully completed the program. If recidivism rates were reported for offenders who were referred to the program but failed to complete treatment, the "success rates" for the program would be substantially worse than for untreated offenders.

patients.[60] In short, involuntary treatment of sex offenders was simply not effective in reducing future criminal behavior by this group of offenders. Thus, the programs could not be justified as producing effective treatment.

Some evidence also indicated that treatment programs permitted serious sex offenders to serve less time in confinement and, in many cases, to avoid punishment altogether.[61] In addition, some critics concluded that many sex offenders were manipulating these programs by using them to avoid prison while not making any serious effort to change their behavior. Critics argued that these laws made the community more dangerous rather than less dangerous.

Persuaded by such strong empirical evidence, Washington, like most states in America, abandoned the involuntary treatment of sex offenders in lieu of punishment. Instead, treatment was made available to eligible convicted sex offenders on a voluntary basis while they served their prison terms. As of April 16, 1992, approximately 196 convicted sex offenders were receiving treatment at the Twin Rivers Treatment Center in Monroe, Washington.[62] Approximately 195 sex offenders were on a waiting list for treatment.[63]

E. "Law and Order" as a Social Movement

Abandoning the medical model of involuntary commitment for treatment of sex offenders was consistent with the general cycle of "law and order" reform that has swept America since about 1980. In *Back to the Asylum: the Future*

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60. Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992). *But see* Daniel Coleman, *Therapies Offer Hope for Sex Offenders*, NEW YORK TIMES, April 14, 1992, at JB5 (indicating new therapies such as cognitive restructuring and relapse prevention may be effective for some sex offenders on a voluntary basis).

61. As the American Bar Association commented, "Some legislatures came to feel that offenders were being released prematurely under such [sexual psychopath] statutes, with consequent danger to public safety." ABA STANDARDS, *supra* note 21, 7-8.1 at 459.

For example, the 1979 repeal of the Wisconsin Sex Crimes Act, 1951 Wis. Laws ch. 542, was seen as a "law and order" measure based on perceptions that offenders might be released "too soon." Marie Therese Ransley, Note, *Repeal of the Wisconsin Sex Crimes Act*, 1980 WIS. L. REV. 941, 950-51.

62. Telephone interview with Barbara Schwartz, Director, Sex Offender Treatment Program, Twin Rivers Treatment Center (April 20, 1992).

63. *Id.* Of these 195 offenders, 123 are on an active waiting list at Twin Rivers, 17 offenders are in other facilities and would be released within three years, and 55 other sex offenders are scheduled for release within 37-60 months. *Id.*

of Mental Health Law and Policy in the United States, my colleague, Mary L. Durham, and I demonstrate that over the last decade or so, the criminal law has severely minimized mental disorder as an excusing condition for harmful behavior.[64] The insanity defense and other defenses based on mental disorder have been significantly narrowed or abolished. Conviction and punishment of offenders, rather than commitment and treatment, have become the hallmarks of the neoconservative era.

Repeal by most states of their sexual psychopath laws is consistent with this changing ideology. Mental disorder and treatment will not be tolerated when perceived by the public as permitting the release of potentially dangerous individuals into society to prey again on unsuspecting victims and as excusing rather than punishing those individuals. On the other hand, as the new Washington sexual predator law demonstrates, society seems quite willing to adopt the medical model of indeterminate treatment when it serves a social control function rather than a therapeutic function.

In sum, changing ideologies have transformed the American criminal justice system, and sexual psychopath laws have been virtually eliminated from society's crime control arsenal. Early sexual psychopath laws provided involuntary treatment rather than punishment. Today, sex offenders are being punished as responsible moral agents and are offered treatment in prison only if they want it. The pendulum swing from the rehabilitative ideal and indeterminate sentencing to a just deserts system of determinate sentencing illustrates the process of a story being retold. It also reflects how the perspective of the lawmaker as narrator has shifted in response to the stories being told by neoconservatives and victims' rights groups. These stories have new import: criminals, especially sex offenders, are responsible moral agents who have earned punishment for their bad acts.

IV. LAW REVISION

Until the very end of the 1980's, no agitation existed in Washington to change how sex offenders were processed under the law. What generated a sudden urgency for law revision concerning sex offenders, and why did the Washington legislature embrace the medical model of involuntary treatment that

64. LA FOND & DURHAM, BACK TO THE ASYLUM, *supra* note 32.

it had so recently abandoned as ineffective and harmful to public safety?

A. Rising Crime Rates and a Powerful Story

A dominant background catalyst in this new cycle of law revision is likely the rather steady and sometimes sudden surge in crime rates in America since about 1960. Crime against persons and property began to increase significantly in the early 1960's—the halcyon days of the rehabilitative ideal—and increased at alarming rates in the 1970's. According to the Uniform Crime Reports, the rate of violent crime increased almost fifty percent between 1971 and 1980.[65] Although crime leveled off and even declined briefly during the early 1980's, crime rates generally continued to increase during the greater part of the 1980's.[66] Unquestionably, America has become a more violent place in the second half of the twentieth century. Not surprisingly, the public has become more fearful of crime and criminals.[67]

But the rather steady increase in crime cannot explain the sweeping legal changes dealing with sex offenders enacted by the Washington State Legislature in 1990. Although the crime rates surely created a favorable context for law and order revision, other precipitating causes also contributed to these legal changes. Foremost among these is the story of "the little boy." As recounted so powerfully by Professor David Boerner in his contribution to this symposium,[68] the sexual mutilation of a seven-year-old boy by Earl Shriner two years after Shriner's release from prison inflamed public passion.

The story of the little boy became the story of sex offenders and sex crimes. This tragic tale and its effect on law revision provide compelling evidence of the power of narrative to shape public imagination and to generate irresistible clamor for law revision as symbolic reassurance to the community.

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65. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE U.S.: UNIFORM CRIME REPORTS FOR THE UNITED STATES (1980).

66. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE U.S.: UNIFORM CRIME REPORTS FOR THE UNITED STATES (1988).

67. *See* RESEARCH & FORECASTS, INC., THE FIGGIE REPORT ON FEAR OF CRIME: AMERICA AFRAID, Parts I, II, and II (Willoughby, Ohio: A-T-O, Inc. 1980).

68. *See* David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992).

B. The Compelling Power of Narrative

Stories play an influential role in shaping the law. Indeed, the process of law revision itself can be seen as the telling of distinct stories.[69]

James Boyd White provides an enlightening insight into the role narration plays in molding legal change.[70] The story is the most basic way in which society organizes its collective experiences and infuses meaning into them. Stories are always incomplete, ever-evolving, and unstable. We retell a story "over and over again . . . claiming a meaning for it in light of new events; or, more precisely, claiming slightly shifting meanings as new experiences add new material."[71] Events initially considered unimportant later take on greater significance in view of constantly unfolding experiences. Conversely, what once seemed of totemic importance can quickly lapse into triviality.[72] Society constantly adjusts its sense of import.[73]

The process of law revision is the act of telling stories, recognizing and building on multiple stories.[74] That this process provides for the retelling of multiple stories is not accidental or even incidental; it is deliberate and structural. Legislative hearings seek stories from the community. These tales may be similar or divergent. After listening to narratives told by the community, those empowered select an official story and then translate it into a more formal fable: a law. This process is both selective and reductive: "[N]o story can include everything[;] . . . every story is a reduction, a fiction, made from a certain point of view."[75] Important characters and events will necessarily be left out of the story. The license to include or exclude is given over to the narrator who has a point of view. The story will surely reflect the teller's perspective, including bias and interest.

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69. For additional discussion of the role of narratives in the process of law reform, *See* J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781 (1992).

70. WHITE, *supra* note 11, at 168.

71. *Id.* at 170.

72. *Id.*

73. *Id.* For example, the changing criminal procedure ideologies adopted by the Warren, Burger, and Rehnquist Courts may be seen as a process of retelling evolving stories: from telling a story of repressed, downtrodden minorities to telling a story of an increasingly violent, crime-riddled society. *See also supra* notes 31-40 and accompanying text.

74. *Cf.* WHITE, *supra* note 11, at 174.

75. *Id.* at 175.

If law revision is a process of selective storytelling and the official story fails to be as complete and contextualized as possible, then the resulting law may be unwise and unjust. The recent law revision process in Washington, which spawned a sexual psychopath law unique in American history, did not attempt to tell a social narrative as completely and accurately as possible. Rather the narrators of *this* story recounted it to placate their audience. As a result, the whole story has not been told.

C. The Task Force and Its Narrative

The major genesis of the Washington law revision was the Governor's Task Force on Community Protection. This group of twenty-four members, selected by Governor Booth Gardner, was charged with reviewing Washington's law and policies to see how they might be improved to better safeguard past and prospective victims against sex offenders. Observers have offered a variety of reasons why a task-force approach to law revision was taken. These explanations range from ensuring bipartisan support for any recommendations that might emerge[76] to heading off more radical "law and order" proposals[77] by taking law revision out of the traditional political and legislative processes.

In any event, the Task Force was chosen as the storyteller with authority to tell the officially sanctioned version. Thus, the story ultimately told by the Task Force would, and did, reflect the perspective, interest, and bias of its members. Although valid and well-intentioned reasons for using the

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76. Indeed, the measure drafted by the Task Force, Second Substitute Senate Bill 6259, passed unanimously on all readings in both houses of the legislature. *See* 1 WASHINGTON LEGISLATIVE DIGEST AND HISTORY OF BILLS OF THE SENATE AND HOUSE OF REPRESENTATIVES 51ST LEGISLATURE 541-42 (8th ed. 1990).

77. The call for castration of sex offenders gathered surprisingly strong support among Washington legislators. Jim Simon, *Castration: Would It Stop Offenders? Experts Split*, THE SEATTLE TIMES, Jan. 15, 1990, at A1.

Support for castration of sex offenders came not only from extreme conservatives, but also from mainstream legislators, including Senate majority Leader Jeannette Hayner. *Id.* at A1. This support is somewhat surprising because no appellate court in the United States has yet upheld surgical castration of sex offenders, even on a voluntary basis. However, some courts have permitted "chemical castration" with the drug Depo-Provera, which lowers the level of the male hormone testosterone. Unlike surgical castration, this treatment is reversible. *See, e.g.*, State v. Krieger, 471 N.W.2d 599 (Wis. App. 1991) (implicitly upholding use of Depo-Provera); Gauntlett v. Kelley, 849 F.2d 213, 215 (6th Cir. 1988) (making Depro-Provera treatment a condition of probation.).

task-force approach may exist, the Task Force posed serious risk to the process of rational law revision for a number of important reasons.

As discussed earlier,[78] all narrators are inherently limited storytellers. The Task Force was further hampered in telling the story of sex crimes in Washington because of its basic structure. The Task Force could not tell the complete story because it could not hear the entire story. Let me explain.

First, the Task Force did not hear competing stories because it was a closed group. It held a series of public hearings; however, most of the stories told were ones of anger and fear. The Task Force did not hear the stories of defense attorneys, sex offenders, or their families. The atmosphere of these hearings was simply not supportive of those who would have told cautionary stories. In addition, the criminal defense bar was underrepresented on the Task Force. Of the twenty-four members, only two members of the Task Force had any experience defending criminals, and none of them were currently practising in the field.[79] The defense bar was not formally represented. Conversely, victims' rights groups were generously represented on the Task Force.[80] This apportionment process seemingly impacted the group. One will not find a single dissenting comment throughout the Task Force Report. Apparently, the political pressure to enact the commitment law was so overwhelming that any opposition was futile.[81]

To add to the problems of perspective, bias, and silencing, the Task Force was unduly weighted with experts who had a vested interest in the answers to some of the most important questions to be considered: Are sex offenders mentally disordered? Are sex offenders especially dangerous? If so, can mental health professionals accurately identify which ones are especially dangerous? Is involuntary treatment effective in reducing recidivism among sex offenders?[82] The answers to

78. *See* notes 73-75 *supra* and accompanying text.

79. Task Force member Robert Stalker was an attorney with Evergreen Legal Services, the statewide agency that offers legal services to low-income persons. Yvonne Huggins-McLean, another member, was a former public defender. TASK FORCE REPORT, *supra* note 48, at I-6.

80. Task Force members included: Ida Ballasiotes, chairperson of Friends of Diane and SAVUS (Stop All Violent Unnecessary Suffering); Helen Harlow, mother of the little Tacoma boy; and Trish Tobis, president of Family and Friends of Missing Persons and Violent Crime Victims. TASK FORCE REPORT, *supra* note 48, at I-4 to I-7.

81. Scheingold et al., *supra* note 60, at 816-17.

82. Task Force members included: Roland Maiuro, Director of the Harborview

those questions were largely delegated to a small number of Task Force members, some of whom run sex offender treatment programs for victims of sex offenses and others who treat sex offenders.[83] Their programs are heavily funded by the legislature. Conversely, a number of nationally recognized experts in law and mental health who have written extensively on civil commitment and the criminal responsibility of the mentally disordered were not appointed to the Task Force nor were they invited to evaluate its recommendations. In short, the process lacked the breadth of disinterested knowledge, expertise, and deliberation that can enhance the quality of law revision.

The outpouring of community frustration and indignation was, in retrospect, not surprising. As already noted, crime had been steadily increasing for the better part of two decades.[84] The public meetings provided an opportunity for citizens to express their fear and frustration over the increasing crime that has plagued society for the last two decades. This diffuse public fear focused on a single outrage and its perpetrator. The criminal record of the attacker, his repulsive personal appearance, and the special vulnerability of his victim combined with the graphic visualization of the mutilation contributed to the emotional impact of the story and the resulting outpouring of rage and calls for revenge.

The story of "the little boy" became the empirical foundation for the sexually violent predator law. This vivid account of a sex offender—one who carefully planned his horrible crime, provided graphic verbal and visual evidence of his violent intentions, and relentlessly stalked his vulnerable victims—was transformed into a paradigm of sex offender behavior. The story thus provided the paradigm problem that required a fail-safe solution. Together with several other noto-

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Anger Management Program at Harborview Medical Center; Lucy Berliner, social worker at Harborview Medical Center's Sexual Assault Center; and Robert Scherz, Medical Director of the Sexual Assault Program at Mary Bridge Children's Center. TASK FORCE REPORT, *supra* note 48, at I-5.

83. This bias seems to be reflected in other portions of the 1990 Community Protection Act. The Act also established certification requirements for sex offender treatment providers, circumventing the procedures for establishing the regulation of health care provided in WASH. REV. CODE ch. 18.120 (Supp. 1990-91). *See* 1990 Wash. Laws ch. 3, §§ 801-811 (codified at WASH. REV. CODE ch. 180.155 (Supp. 1990-91)).

84. *See supra* notes 65-66. As Stuart Scheingold notes, the rates for the crime of rape have not increased as much as rates for homicide, robbery, and burglary. Scheingold et al., *supra* note 60, at 812-13.

rious cases,[85] the story of the little boy convinced the public to overestimate grossly the relative frequency of similar sex offenses.[86]

The Task Force did nothing to disabuse the public of this mythopoeia. It did not undertake any review of crime rates in Washington state nor did it review and analyze sex crime rates for the state. Thus, the public had no way of knowing whether its anxiety about sex crimes was based on a significant increase in such crimes in this state. In fact, as Scheingold has shown, no empirical basis existed for concluding that sex crimes were increasing in Washington state.[87]

Rather, the Task Force proceeded on a political basis. Because the public and the media said there was a problem, there was a problem. It appears that the political imperative of the moment dictated that academics, who tend to view social problems from different, and perhaps more objective, perspectives not be appointed to the Task Force.[88] This failure may explain why the Task Force Report contains so much misleading and, in many cases, simply incorrect information about sex offenders.[89] Indeed, absolutely no discussion or analysis of some essential and fundamental factual questions is to be found in the Task Force Report.

Without an accurate grasp of sex crime rates, the extent of victimization, recidivism rates for sex offenders, the effectiveness of involuntary treatment, and other salient factors about sex crimes, the Task Force lacked a sound empirical basis for effective law revision. In turn, it was highly unlikely that the proposed legislation, based on the Report, would be responsive to actual problems in the real world. Perhaps as important, there was less opportunity to temper the anger and emotion of the moment with relevant expertise and sound social science information.[90] Inevitably, the Task Force succumbed to the

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85. In September, 1988, Gene Raymond Kane, who had previously been imprisoned for two different sexual assaults, killed Diane Ballasiotes in Seattle while on work release from prison. Julie Emery, *Settlement Expected in Ballasiotes Death Suit*, THE SEATTLE TIMES, July 6, 1990, at B5. Ida Ballasiotes, the mother of the victim, subsequently served on the Governor's Task Force.

86. Scheingold et al., *supra* note 60, at 816-20.

87. *Id.* at 811.

88. Only Professor Boerner, a law professor at the University of Puget Sound School of Law in Tacoma, Washington and a former prosecutor, held a full time academic appointment.

89. *See also* Scheingold et al., *supra* note 60.

90. A few individuals subsequently expressed serious concern about the

distorting power of narrative. In turn, it did not tell the whole story, or even a complete story, of sex crimes in Washington.

D. The Distorting Power of Narrative

As demonstrated above, stories are compelling. Indeed, storytelling is probably the most convincing mode of persuasion in our culture. Because of its captivating power, narrative can have a particularly distorting effect on law revision.

Lawmakers use narrative when constructing the paradigm case. Legislators conceptualize *the* problem to be solved as *the* problem told in the story. Consequently, legislators often try to pass laws that promise the public that *this* case will never happen again. The predator commitment law is precisely this type of misguided law revision. The law makes the promise that the story of "the little boy" will never be told again.

The promise is illusory. A convicted sex offender will be released from prison and then sadly but inevitably commit another heinous sex crime. We cannot, of course, identify accurately who that person will be. The commitment law merely creates the illusion of effective crime prevention because one cannot know if any person incarcerated under this law would have otherwise committed a crime. These cases of mistakes or inaccurate predictions of dangerousness, false-positives to social scientists, are simply locked away, out of sight and out of mind.

A moving story can be generalized to represent most cases. Thus, law revision usually makes sense if most cases are, in fact, similar to the graphic story. However, if the graphic story is atypical, law revisions may prove in practice to be disastrous public policy. Put differently, an effective and wise law is one that intelligently and fairly resolves most cases most of the time. Most sex offenders, however, are not like Earl Shriner. In his testimony before the Senate Law and Justice Committee, Professor Boerner said:

> What we [on the Task Force] had in mind was the case like *Shriner* where you had direct physical evidence of plans to commit future crimes, diaries, notes, and those sorts of things. I think absent that . . . a psychiatric prediction plus the crime years ago isn't going to be enough to satisfy a jury

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constitutionality and wisdom of the commitment law in legislative hearings held to consider the Task Force Report.

under the standards we've provided.[91]

In fact, the government has not produced a single piece of explicit evidence like that available in the Shriner case that manifests an intent to commit sex crimes in *any* predator commitment trial; yet, it has won *every* case so far relying almost exclusively on a record of past crimes and a prediction of a future crime.[92] Juries are simply too willing to assume that anyone who has committed a crime in the past may commit one in the future. Even more importantly, juries are unwilling to take responsibility for releasing someone who might commit another crime. The burden of this decision is too heavy to ask of citizens.

Of course, other stories could have been told but were not. Earl Shriner's story is interesting in its own right. Shriner's I.Q. ranged from a low of sixty-seven to sixty-nine based on the Wechsler Adult Intelligence Test. This clearly places him in the "Mildly Mentally Retarded" range. Evidence also indicated that he suffered neurological brain damage. Newspaper accounts and the trial record establish that Shriner was repeatedly abused sexually and mentally in his youth, but he never received any meaningful treatment during his childhood. Apparently, he could barely read and write.[93] Of course, these personal characteristics and life history do not excuse what he did. But in a humane society they would certainly evoke some modicum of sympathy and compassion. The full story of Earl Shriner was never told.

Likewise, the story of Vance Cunningham is another tale that was never told but is also interesting. Cunningham had a history of dyslexia, which remained undiagnosed until he dropped out of grade school at age fifteen. Criticized for being a slow learner in school, Cunningham's dyslexia contributed to feelings of inadequacy and failure. While serving prison time for two 1987 second degree rapes of prostitutes, Cunningham

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91. *See* Amicus Curiae Brief of the American Civil Liberties Union of Washington at Appendix D, *In re* Young (Wash. filed Feb. 4, 1991) (No. 57837-1) (containing excerpts from pages six and seven of transcript compiled from a tape recording of Professor David Boerner's testimony before the Senate Law and Justice Committee on Jan. 11, 1990).

92. The state has dismissed one petition seeking commitment under the predator commitment law before presenting its case to a jury. *In re* M., No. 91-2-24039-6 (King County Super. Ct. filed October 28, 1991).

93. Letter from Dino G. Sepe, attorney for Earl Shriner (Mar. 10, 1992) (on file with the *University of Puget Sound Law Review*).

sought treatment.[94] He did not receive it, however; he was told his sentence was not long enough to qualify him for treatment. While in prison, Cunningham worked toward his GED and used motivational and self-help materials. After voluntarily working with a reading specialist who taught him how to learn, his reading level improved from a third grade to a ninth grade level. Cunningham also studied marine mechanics.

After his release, his family and friends noticed dramatic changes in Cunningham. Initially, he stayed with family and friends and worked with a trucking company while he looked for better employment. He had increased his ability to read and seemed more confident. Cunningham reduced his use of alcohol. He rented an apartment and even obtained insurance for the first time in his life. During this time, he complied with all conditions of his release, including registering as a sex offender. When he secured a job in his chosen field of marine mechanics on a commercial fishing boat, he felt "extremely proud."[95] As Cunningham stated: "I was doing everything to make myself the best citizen I thought I could be."[96] Four and one half months after his release, he was arrested without a criminal charge and committed to the Special Commitment Center at Monroe where he languishes to this day.

At Cunningham's trial, the state did not introduce any evidence of dangerous or even inappropriate behavior while Cunningham was in prison or since his release from prison. Yet, he may spend the rest of his natural life sitting in a locked cell at Monroe. This story, of course, is right out of Franz Kafka's classic tale, *The Trial*.[97] But apparently, no one anticipated or told a story like Vance Cunningham's when the legislature passed the sexually violent predator law.

When only one story is told, as occurred in the enactment of the predator commitment law, no competing stories give context and depth to the larger narrative. No one prods for reflection and caution. No other stories stimulate reconsidera-

94. In 1980 Cunningham, then 15 years old, pleaded guilty to assault in the second degree and was sentenced to 20 days of confinement. In 1984 at age 20 he pleaded guilty to rape in the second degree and was sentenced to 31 months in the Department of Corrections. In 1987 Cunningham was convicted of two counts of rape in the second degree and was sentenced to 54 months on each count, to be served concurrently.

95. Report of Proceedings, State v. Cunningham (King County Super. Ct. filed May 29, 1991) (No. 90-2-20568-1).

96. *Id.* at 102-103.

97. *See* Robert C. Boruchowitz, *Sexual Predator Law: The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827 (1992).

tion and continue the search for understanding. Rather the lone story, even though woefully incomplete, becomes *the* truth.

E. The Confirming Conclusions of Cognitive Psychology

Strong evidence confirms that narrative distorts and even impedes rational analysis. Studies by cognitive psychologists have demonstrated that people will assign much greater weight to information contained in vivid narratives or case histories, even though the information is quite weak as evidence, than they will assign to statistical information that is highly probative. Experts believe that that this process of human inference occurs because graphic information tends to be more emotionally interesting, concrete, and image-provoking than abstract data summaries.[98]

The following experiment demonstrates how a single, vivid, yet questionably informative case history can influence social attitudes when pallid statistics of far greater evidential value fail to persuade.

> Subjects were given a description of a single welfare case. The description (condensed from an article in *The New Yorker* magazine) painted a vivid picture of social pathology. The central figure was an obese, friendly, emotional, and irresponsible Puerto Rican woman who had been on welfare for many years. Middle-aged now, she had lived with a succession of "husbands," typically also unemployed, and had borne children by each of them. Her home was a nightmare of dirty and dilapidated plastic furniture bought on time at outrageous prices, filthy kitchen appliances, and cockroaches walking about in the daylight. Her children showed little promise of rising above their origins. They attended school off and on and had begun to run afoul of the law in their early teens, with the older children now thoroughly enmeshed in a life of heroin, numbers-running, and welfare.
>
> In a second set of conditions, the article was omitted and subjects were given statistics showing that the median stay on welfare for all middle-aged welfare recipients was two years and that only ten percent of recipients remained on the welfare rolls for four years or longer. These statistics, which actually are approximately correct, stood in sharp contrast to the subjects' beliefs about welfare. (Control sub-

98. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 43-62 (1980).

jects believed that the average stay on welfare was about ten years.)[99]

Researchers conducting the study found that those subjects who had been given a vivid description of this one particular welfare family expressed more unfavorable attitudes toward welfare recipients than the control group who had not heard the story of this family. Even more startling, however, is that the surprising but pallid statistical information about the average stay on welfare had no effect on changing the same control group's attitudes and opinions about welfare recipients in a favorable direction.

This experiment suggests that stories, although of marginal evidential value, persuade nonetheless because more time may be spent attending to stimulating information than to boring statistical information of equal or greater relevance. Moreover, the graphic concreteness of stories is more easily remembered and retrieved than abstract information. Events described in explicit terms also have enhanced emotional impact because actors, actions, and context are more detailed and specified. This clarity makes an event more imaginable and provokes other memories or associations. Finally, vivid information may remain active in people's thought processes longer than more pedestrian data, thereby increasing memory availability and prompting people to assume tacitly that what has occupied their thoughts for so long must be important.

Researchers have thus concluded that people will irrationally cast aside probative information, which is dull, in favor of interesting information which is of questionable normative significance. Frequently, people will cling to erroneous impressions even when confronted with strong evidence dispelling those impressions.

It is no surprise, then, that the story of "the little boy" drove law revision and that the Task Force and legislature did not consider extremely relevant but "abstract" and "dull" empirical data about sex crimes and sex offenders, which was particularly useful to their objectives. But we should also not be surprised if the commitment law proves over time to be ineffective and counterproductive. After all, the law was shaped by the distorting power of narrative.

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99. *Id.* at 57.

F. Conclusion: The Process Abused

The history of sexual psychopath laws in the United States demonstrates that all of the laws' premises had been categorically rejected. Mental disorder did not cause individuals to commit sex crimes. Involuntary treatment was not effective in reducing recidivism rates for sex offenders. Thus, the medical model of indeterminate treatment did not serve a therapeutic goal. Nor did it serve other important goals including retribution or incapacitation. Virtually every state in America had discarded this approach to sex offenders.[100]

Only five years before the enactment of the predator commitment law, the Washington legislature repealed the state's sexual psychopath law.[101] Yet, within an extremely short time, the legislature had once again resurrected the medical model of indeterminate treatment and implemented it in its most extreme form. This process demonstrates that the legislature could not have considered the customary bases for law revision, including a thorough review of empirical knowledge and a thoughtful analysis of both its costs and effectiveness. Rather, the legislature, reacting to one vivid case[102] and responding to the public passion mobilized by victims' rights groups,[103] disingenuously decided to use civil commitment of the mentally ill as a justifying facade for lifetime preventive detention.

Additionally, the predator law served to bond the community by channeling the public's diffuse instinctual urge for retaliation, stirred by the story of "the little boy," on to a fixed

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100. Norval Morris notes how even Illinois rarely uses its sexual psychopath law. *See* Norval Morris, *Keynote Address*, 15 U. PUGET SOUND L. REV. 517 (1992).

101. *See supra* note 24 and accompanying text.

102. Law reform spawned by tragic crimes is not unusual. Good evidence indicates that extensive publicity of a high profile crime generates public fear and demands for law reform. LA FOND & DURHAM, BACK TO THE ASYLUM, *supra* note 32. Indeed, Washington went through this process before when the legislature revised its Involuntary Treatment Act in 1979 to make it easier to commit mentally ill individuals for involuntary treatment after a patient, who was denied *voluntary* admission to Western State Hospital, murdered two neighbors. The effect of this law was to exclude virtually all voluntary patients from Western State Hospital. Mary L. Durham & John Q. La Fond, *The Empirical Consequences and Policy Implications Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985) [hereinafter Durham & La Fond, *Empirical Consequences*].

103. Victims' rights groups made sure their members attended legislative hearings and were seated in prominent positions, thereby visibly reminding legislators of their power at the polls. The year 1990, in which the legislature passed the Community Protection Act, was also an election year.

target of powerless and hated "outsiders" who could serve as an outlet for communal anger and revenge.[104] Conveniently, the law also diverted public attention away from politicians' earlier failures to "solve the crime problem." Many of the other laws recommended by the Task Force and passed by the legislature are very sound public policy. One wonders why it took a tragedy before they were enacted.

The fast-track process of law revision and the uncontrollable climate of public loathing for sex offenders precluded thoughtful reflection and deliberation.[105] Only after the law was enacted and implemented were some of the significant problems spawned by the law thoroughly analyzed and discussed. Not surprisingly, these problems were analyzed in depth only in the first constitutional challenge to the law.[106] Thus, the stakes that hinge on resolution of these issues are now enormous.

This haphazard type of law revision process is dangerous. Legislatures all too often respond to the will of the majority in the heat of the moment without fully understanding the full nature of the problem and whether the proposed legal solutions will be effective. Law must operate over time and over many cases. It should not zig and zag every time a terrible human tragedy occurs. As important, legislatures need to be more candid about the limits of law. Not every social problem can be solved by passing a law. Law revision is particularly ill-conceived if the law is contrary to sound empirical knowledge and fundamental values held deeply over time. Enacting a criminal statute may comfort society by promising a solution, but in the long run, such an empty promise simply creates more anger and frustration with the legal system and those connected with it. And, as Professor Julie Shapiro insightfully notes,[107] such legislative action encourages society to place the causes of sexual violence in the pathological psyches of a small and unique group of "disordered" offenders. This societal perception allows us to avoid any need to examine ourselves and

104. HOWARD S. BECKER, OUTSIDERS—STUDIES IN THE SOCIOLOGY OF DEVIANCE 1-18 (1963).

105. *See* Scheingold, *supra* note 60, at 816-20.

106. *See* Briefs of Appellants and Amici Curiae, the American Civil Liberties Union of Washington, and the Washington State Psychiatric Association, *In re* Young (Wash. filed Feb. 4, 1991) (No. 57837-1).

107. Julie Shapiro, *Sources of Security*, 15 U. PUGET SOUND L. REV. 843 (1992).

our culture as potentiating such violence.[108]

If anything, the Shriner case may tell us that the criminal justice system is already overloaded and is being asked to carry far too much weight for community safety. Perhaps scarce resources could have been spent more productively by providing treatment to Shriner when he was young or, if necessary, in ensuring convictions for more serious offenses and longer sentences in his previous prosecution. But the prosecutor's office was already under tremendous caseload strain at the time. Perhaps the sentencing judge, too, did not expressly make clear that Shriner's sentences in his earlier adult conviction were to be served consecutively rather than concurrently because the judge was being asked to do too much. Simply put, loading our criminal justice, or civil commitment system if you prefer, with more and more tasks is a formula for an even greater systems failure in the future. Effective social control requires recognizing the limits of the criminal law and making intelligent choices.

V. THE LAW EXAMINED

At the heart of the predator commitment statute is a single question: can the state confine a once-convicted sex offender who has served his full prison term and who is entitled under the law to his liberty, but who is considered at risk of committing another sex crime if released? In its most compelling, and distorting, literary form, the question might be retold like this: would *you* let Earl Shriner out? As we have already seen, his is not the only story or the only question that must be told or answered.

A. The Legislature's Options

The legislature had a number of potential options open to it. To understand why lawmakers chose the predator commitment law, one must consider these options. As noted earlier, Washington adopted determinate sentencing in 1984 and enacted relatively light penalty provisions for sex offenders.[109] The legislature could have reduced the risk to the community from chronic sex offenders with relative ease through the use of prospective legislation. It could have enacted extended,

108. *Id.*

109. *See supra* notes 48-49 and accompanying text.

indeterminate sentences for repeat sex offenders. This approach, however, would have undermined the philosophy of determinate sentencing adopted by the state just a few years earlier. Alternatively, the legislature could have enacted indeterminate commitment for treatment of sex offenders in lieu of punishment. But this would have undermined the recently adopted just deserts theory of punishment. Lawmakers could have also enacted lifetime sentences for repeat sex offenders. Finally, the legislature could have, and did, adopt enhanced penalties for sex crimes to apply to all criminals convicted of these crimes after the new legislation became effective.[110] These penalties were designed to keep future sex offenders, particularly repeat offenders, in prison for longer periods of time, thereby preventing those offenders from committing new crimes while incarcerated.

But what could have been done about convicted sex offenders considered dangerous who were presently serving prison terms[111] and who were about to reach the end of their lawful periods of confinement? Could lawmakers promise their constituents that the law could keep possible future Earl Shriners in confinement forever?

Several possibilities were available to keep currently incarcerated sex offenders off the streets. The legislature could have extended prison terms for already convicted sex offenders, expanded the general civil commitment statute to include sex offenders, adopted preventive detention, or created a special commitment system for sex offenders. Let us examine these options in turn.

1. Extending Prison Terms Retroactively for Selected Sex Offenders

First, the legislature might have simply tried to extend, on a selective basis, the prison terms of sex offenders presently in custody who are considered at risk for reoffending. Under this approach, the state would review the records of sex offenders currently serving their prison terms and would extend the period of incarceration for those considered at risk of reoffending if released. This approach, however, presents a fundamen-

110. *See* 1990 Wash. Laws ch. 3, §§ 701-702 (codified at WASH. REV. CODE §§ 9.94A.310-.320 (Supp. 1990-91)).

111. Many of the prison terms were surprisingly short given the offenders' records of past convictions.

tal problem; it is unconstitutional. The constitutional prohibition against *ex post facto* punishment clearly precludes any attempt to extend prison terms.[112] Case law indisputably establishes that the legislature was bound to the determinate sentencing philosophy it had adopted in 1984 and that no persuasive argument could be made to uphold an extension of maximum sentences for a punitive or protective purpose.[113]

2. General Involuntary Civil Commitment

A second option open to the legislature would have been to use the general civil commitment law to keep presently confined sex offenders under state control. Coercive civil commitment under the state's Involuntary Treatment Act ("ITA") was an available system of care and control that could have been used to confine mentally ill individuals who, as a result of mental disorder, are dangerous to themselves or to others.[114] The ITA authorizes the state to seek involuntary hospitalization of any individual who suffers from a mental disorder that causes him to be dangerous or gravely disabled.[115] For several reasons, however, this law probably would not have assured the long-term detention of a convicted sex offender who was about to be, or had been, released from prison.

First, the ITA requires the state to prove that an individual is mentally ill. As noted earlier, most sex offenders are not

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112. The U.S. Constitution prohibits the enactment of penal legislation that: (1) punishes as a crime an act previously committed that was innocent when done; (2) makes more burdensome the punishment for a crime after its commission, or (3) deprives one charged with a crime of any defense available according to the law at the time the act was committed. U.S. CONST. art. I, § 10; Collins v. Youngblood, 497 U.S. 37 (1990).

113. *Collins*, 497 U.S. at 37. Extending prison terms for crimes already committed and prosecuted is clearly prohibited by the ex post facto clause. *See also* Addleman v. Board of Prison Terms & Paroles, 107 Wash. 2d 503, 730 P.2d 1327 (1986) *and* Foucha v. Louisiana, 112 S. Ct. 1780, 1807 (1992) (Thomas J. dissenting):

> If Foucha had been convicted of the crimes with which he was charged and sentenced to the statutory maximum of 32 years in prison, the State would not be entitled to extend his sentence at the end of that period. To do so would obviously violate the prohibition on *ex post facto* laws set forth in Art. I, § 10, cl. 1.

114. *See generally* John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499 (1981) [hereinafter La Fond, *Purposes of Commitment*].

115. WASH. REV. CODE ch. 71.05 (1989). For a historical overview of this law's derivation and an explanation of how it is implemented, *see* Durham & La Fond, *Empirical Consequences*, *supra* note 102.

mentally ill.[116] Indeed, the Task Force Report candidly acknowledged that the individuals it sought to confine were not mentally ill.[117] Second, to show dangerousness, the state would have to present evidence of "recent, overt acts" by the individual that caused harm or the reasonable apprehension of harm to others.[118] In short, the underlying philosophy of the ITA is to permit short-term intensive hospitalization of mentally ill individuals as dangerous only if their recent behavior establishes that they are dangerous. This philosophy is based in part on the fact that mental health professionals have no expertise in making long-term predictions of dangerousness.[119] Long-term commitment is discouraged, both by stringent evidentiary requirements and by automatic short-term judicial review of commitment.[120] Of course, most sex offenders confined in prison or recently released from prison would not have committed recent, overt acts manifesting their dangerousness.[121] To their credit, neither the Task Force nor the legislature wanted to change the ITA's commitment criteria or to permit longer confinement under that law.

More importantly, the Task Force and the legislature did not want to use behavioral commitment criteria. The legislature sought to avoid criteria that looked at how the individual was actually behaving in the time period just before the government sought his commitment. Both the ITA[122] and Supreme Court cases interpreting that law[123] clearly required

116. *See supra* notes 26-28 and accompanying text.

117. *See infra* note 142 and accompanying text.

118. *See* In re Harris, 98 Wash. 2d 276, 284, 654 P.2d 109, 113 (1982). Moreover, the law requires that anyone committed as dangerous based solely on threats could not be confined beyond the initial 14 day period of hospitalization unless the state could prove he or she actually committed dangerous acts while in confinement. WASH. REV. CODE ch. 71.05 (1989 & Supp. 1990-91).

119. *See* Amicus Curiae Brief of the American Psychiatric Ass'n, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

120. The law provides for automatic judicial review of confinement at 14 days, 90 days, and every 180 days thereafter. *See* Durham & La Fond, *Empirical Consequences*, *supra* note 102, at 404-05.

121. Shriner, of course, was a rare exception; evidence of recent overt acts was present in his case. Professor Boerner concluded that such evidence would be necessary before the government could obtain commitment under the predator law. *See supra* note 91 and accompanying text. His prediction has not proven accurate. *See supra* note 92 and accompanying text.

122. WASH. REV. CODE ch. 71.05 (1989 & Supp. 1990-91).

123. *In re* Harris, 98 Wash. 2d 276, 654 P.2d 109 (1982); *In re* La Belle, 107 Wash. 2d 196, 728 P.2d 138 (1986).

the state to present evidence proving that the individual's recent behavior justified his civil commitment.

The Task Force wanted a system that was essentially retrospective; it wanted a law that would extend prison terms for offenders already in prison based on the individual's prior criminal record. In most cases, the state simply could not produce the type of recent evidence establishing present dangerousness that was required by the ITA and Washington case law. Thus, most sex offenders could not have been committed under the ITA unless it was amended and, even if they could have been committed, the state probably could not have kept most of them in confinement for long periods of time.

Finally, using the ITA would have presented other serious problems. Its use would have seriously compounded the stigma and bias society already associates with the mentally ill.[124] Also, case law suggested that sexually dangerous individuals could not be commingled in institutions with regular ITA patients.[125] Thus, the legislature chose not to utilize the ITA to keep sexual offenders confined.

3. Preventative Detention

Preventive confinement of an individual considered dangerous solely to prevent possible future crime was a third possible strategy the legislature might have used to prevent recidivism. But this system of social control would probably have provided only temporary protection. Preventive detention solely to prevent future crime is constitutionally permissible under our Constitution. The Supreme Court, however, has upheld preventive detention schemes only in extraordinary and extremely rare circumstances and, in most cases, has done so only to permit temporary control over an individual pending subsequent legal proceedings, such as a criminal trial or a juvenile hearing.[126] Moreover, preventive detention is permissible

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124. Organizations concerned with the needs of the mentally ill spoke out against calling sex offenders "mentally ill" because this inaccurate characterization would make the public think that the mentally ill were especially dangerous.

125. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

126. The earliest approved uses of preventive detention arose out of the chaos of war and insurrection. *See* Ludecke v. Watkins, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); Moyer v. Peabody, 212 U.S. 78 (1909) (rejecting due process claim of individual jailed without probable cause by governor in time of insurrection).

More recently, the Supreme Court has permitted short-term detention of dangerous individuals pending other judicial proceedings. *See* County of Riverside v.

only for a brief period of time and only after the government has made a substantial showing that serious harm is imminent and that no other means will prevent the harm from occurring.[127]

The government clearly could not have met the stringent requirements constitutionally required to preventively detain sex offenders. First, in most cases prosecutors could not show imminent harm.[128] Second, detention would not be limited in duration as *Foucha v. Louisiana*[129] and *United States v. Salerno*[130] require. Third, prosecutors would have difficulty proving that less restrictive control measures, such as community monitoring or registration of sex offenders, would not reasonably safeguard the community.

In *Foucha v. Louisiana*, the Court held that Louisiana could not preventively detain indefinitely a person found not guilty by reason of insanity who was no longer mentally ill but was still considered dangerous. Justice White said:

> *Salerno*, unlike this case, involved pretrial detention. We observed in *Salerno* that the "government's interest in preventing crime by arrestees is both legitimate and compelling," and that the statute involved there was a constitutional implementation of that interest. The statute carefully limited the circumstances under which detention could be

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McLaughlin, 111 S. Ct. 1661 (1991) (permitting warrantless arrest and detention of a person suspected of crime for 48 hours before a magistrate must determine if probable cause exists); Gerstein v. Pugh, 420 U.S. 103 (1975) (permitting arrest and detention of a person suspected of crime until a neutral magistrate "promptly" determines if probable cause exists); Carlson v. Landon, 342 U.S. 524 (1952). *See also* Wong Wing v. United States, 163 U.S. 228 (1896) (finding no absolute constitutional barrier to detaining potentially dangerous residents pending deportation proceedings).

The Supreme Court has also approved short-term confinement of dangerous criminal suspects prior to their trial. *See* United States v. Salerno, 481 U.S. 739 (1987) (permitting detention until trial of an arrestee if no release conditions assure community safety); Schall v. Martin, 467 U.S. 253 (1984) (permitting pretrial detention of an accused juvenile delinquent); Bell v. Wolfish, 441 U.S. 520 (1979) (permitting detention until trial of a person arrested for a crime if there is a risk of flight or danger to witnesses).

127. *See* Foucha v. Louisiana, 112 S. Ct. 1780 (1992); *Salerno*, 481 U.S. at 739, 748-49.

128. Even Shriner, who had been fantasizing about his crime and displayed his fantasies in words and drawings, did not commit a crime for two years after his release. In testifying before the Senate Law and Justice Committee on January 11, 1990, Professor Boerner, the principal drafter of the law, concluded that prosecutors would be unlikely to obtain commitment without explicit evidence of impending criminal intent. *See supra* note 91 and accompanying text.

129. 112 S. Ct. 1780 (1992).

130. 481 U.S. 739 (1987).

> sought to those involving the most serious crimes (crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses, or certain repeat offenders), and was narrowly focused on a particularly acute problem in which the government interestes are overwhelming. In addition to demonstrating probable cause, the government was required, in a 'full-blown adversary hearing,' to convince a netural decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or of any person . . . Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the 'stringent time limitations of the Speedy Trial Act.' If the arrestee was convicted, he would be confined as a criminal proved guilty; if he were acquitted, he would go free.[131]

Thus, *Foucha* clearly establishes that the state may not use indefinite preventive detention to prevent a dangerous person from committing a crime.

4. Special Purpose Involuntary Civil Commitment

Clearly, some legal mechanism of control was needed if the state were to confine indefinitely sex offenders considered at risk of reoffending past the expiration date of their prison terms. But the options of extending prison terms or using preventive detention would surely be struck down as unconstitutional and relying on the general civil commitment law for the mentally ill would not be effective.

Then the *Deus Ex Machina* appeared. Only one system of social control authorizes lifetime confinement to prevent possible future harm: involuntary civil commitment of the mentally disabled.[132] The legislature might be able to keep convicted sex offenders in confinement even *after* they had served their full prison terms. To do this the legislature would have to harness the awesome power of the medical model that authorizes indefinite commitment of the mentally ill for treatment and apply it to a speciously fabricated class of "mentally abnormal" sex offenders. It chose to do just that.

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131. *Foucha*, 112 S. Ct. at 1786 (citations omitted).

132. *See generally* La Fond, *Purposes of Commitment*, *supra* note 114; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

B. Involuntary Civil Commitment of Sexually Violent Predators

As noted earlier, involuntary civil commitment of the mentally ill rests on the assumption that individuals suffer from a mental illness that makes them dangerous to themselves or to others and that those individuals are in need of care and control. The legislature, acting on the recommendation of the Task Force, decided to characterize a class of sex offenders as mentally abnormal, dangerous, and in need of control and treatment.

An examination of the Task Force Report and the statute's language reveals that the legislature did not really believe sex offenders were mentally disordered and in need of treatment. Moreover, neither the statute's purpose or effect is to provide treatment for the mentally ill as required by the United States Supreme Court.[133] Thus, this law simply cannot be justified as a legitimate exercise of the state's police power or *parens patriae* power[134] because it does not meet the fundamental constitutional requirement recently enunciated by the United States Supreme Court: "[T]he purpose of commitment following an insanity acquittal, *like that of civil commitment*, is to *treat* the individual's *mental illness* and protect him and society from his potential dangerousness."[135] Likewise, the California Supreme Court said: "Not only is medical treatment the *raison d'etre* of the [California] mentally disordered sex offender law, it is its sole constitutional justification."[136]

The Washington statute does not apply to a group of individuals who are mentally ill in any medically recognized sense as the Washington State Psychiatric Association demonstrated in its *amicus curiae* brief.[137] The law applies to those who suffer from a "mental abnormality" or "personality disorder." "Mental abnormality" has no clinical or diagnostic meaning within medically recognized systems of nomenclature or diagnosis.[138] Indeed, the phrase can mean almost anything includ-

133. Allen v. Illinois, 478 U.S. 364 (1986).

134. For a general discussion of these bases of state authority, *see* La Fond, *Purposes of Commitment*, *supra* note 114.

135. Jones v. United States, 463 U.S. 354, 368 (1983) (emphasis added).

136. People v. Feagley, 535 P.2d 373 (Cal. 1975).

137. Amicus Curiae Brief of the Washington State Psychiatric Ass'n at 3, *In re* Young (Wash. filed Sept. 20, 1991) (No. 57837-1) [hereinafter State Psychiatric Ass'n Brief].

138. "Mental Abnormality" is not used in the AMERICAN PSYCHIATRIC

ing unexpected, not average, not typical, or whatever other meaning an observer chooses to infuse into these words. "Personality disorder" has a clinically recognized meaning; however, its core meaning is essentially tautological. "Antisocial behavior" is most often used to define this diagnostic category. Such behavior can include inability to sustain consistent work, unlawful conduct, irritability, aggressiveness, not honoring financial obligations, impulsiveness, and lying.[139] Simply put, a personality disorder "is but a shorthand way of describing a pattern of maladaptive behavior."[140] Moreover, no personality disorder is specific to sex offenders in the psychiatric system of disease and mental disorder.[141]

Only six years before the enactment of the predator commitment statute, the Washington State Legislature prospectively abolished an involuntary treatment scheme for sex offenders because it did not believe such offenders were mentally ill and could be treated involuntarily. The Task Force also reached this conclusion. It wrote: "Under current laws,

The majority opinion concluded, however, that a citizen could not be considered "mentally ill" because he suffered from an antisocial personality or personality disorder that purportedly made him dangerous to himself or others. Such a system of confinement would, in effect, be based solely on perceived dangerousness and would lead to an Orwellian world of "dangerousness courts," a technique of social control fundamentally incompatible with our constitutional system of ordered liberty. In *Foucha*, Justice White warned states not to abuse the medical model of involuntary civil commitment for social control purposes:

> Here, in contrast, the State asserts that because Foucha *once committed* a *criminal act* and now has an *antisocial personality* that sometimes leads to aggressive conduct, a disorder for which there is *no effective treatment*, he may be held *indefinitely*. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a *personality disorder* that may lead to criminal conduct. The same would be true of *any convicted criminal*, even though he has *completed* his *prison term*. It would also be only a step away from *substituting confinements* for *dangerousness* for our present system which, with only narrow exceptions and aside from permissible confinements for *mental illness*, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.[147]

With uncanny clairvoyance, Justice White exactly described the Washington statute which authorizes the government to do precisely what *Foucha expressly* says the government may *not* do: confine someone indefinitely as dangerous who was not mentally ill but simply had a personality disorder or an antisocial personality.[148]

The words of the statute establish this fundamental premise beyond question. In enacting the law, the legislature said:

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147. *Id.* at 1787 (emphasis added).

148. According to *Foucha*, the state may not commit such an individual even if the antisocial personality "sometimes leads to aggressive conduct." *Foucha*, 112 S. Ct. at 1787. It should be noted that Foucha, unlike most individuals who are subject to incarceration under the Washington statute, had been found legally insane; i.e., to have suffered from a mental illness which was causally related to his criminal behavior. If a "personality disorder" or "anti-social personality" is constitutionally insufficient to civilly commit someone like Foucha, *a fortiori*, it is constitutionally insufficient to civilly commit individuals who have never been found to suffer from mental illness which was causally related to their criminal behavior.

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do *not* have a *mental disease* or *defect* that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with *serious mental disorders* and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have *anti-social personality features* which are *unamenable* to existing *mental illness treatment* modalities and those *features render* them likely to engage in sexually violent behavior . . .[149]

The statute expressly creates a special class of persons who are not mentally ill and whose past criminal conduct was not caused by mental illness.[150] Rather, it authorizes lifetime commitment of individuals who suffer from "anti-social personalilty features"[151] which allegedly render them likely to reoffend. *Foucha* establishes that such a system is not a valid use of the medical model of civil commitment.

Even the dissenting opinions in *Foucha* agreed that *civil* commitment requires a finding of both mental illness and dangerousness and that neither "anitsocial personality" or "personality disorder" constitute "mental illness."[152] Both Justice Kennedy and Justice Thomas would uphold the continuing confinement of Foucha based on a showing of dangerousness alone solely because it should be considered a *criminal* commitment rather than a *civil* commitment.[153] Justice Kennedy said:

> The majority's failure to recognize the *criminal* character of these proceedings and its concomitant standards of proof leads it to conflate the standards for civil and criminal com-

149. WASH. REV. CODE § 71.09.010 (Supp. 1990-91) (emphasis added).

150. *See* Bodine, *supra* note 8, at 129.

151. WASH. REV. CODE § 71.09.010 (Supp. 1990-91).

152. *See Foucha*, 112 S. Ct. at 1794-95 (Kennedy, J., dissenting) and at 1801, 1808-09 (Thomas, J., dissenting).

153. Justice Kennedy characterized Foucha's commitment as criminal rather than civil becuase the state proved beyond a reasonable doubt that the defendant committed a crime and the defendant, in turn, successfully established the affirmative defense of insanity; i.e. that at the time of the offense, as a result of mental illness, he did not know what he was doing or that it was wrong. *Foucha*, 112 S. Ct. at 1791-93 (Kennedy, J., dissenting). The state characterized the statute as an exercise of its *civil* commitment authority. *See* Brief of Respondent and Cross-Appellant State of Washington at 17-21, *In re* Young (Wash. filed Oct. 30, 1991) (No. 57836-1).

> mitment in a manner not permitted by our precedents. *O'Connor v. Donaldson* and *Addington v. Texas*, define the due process limits of involuntary *civil* commitment. Together they stand for the proposition that in civil proceedings the Due Process Clause requires the State to prove *both insanity* and *dangerousness* by clear and convincing evidence. Their precedential value in the civil context is beyond question. But it is an error to apply these precedents, as the majority does today, to criminal proceedings.[154]

Justice Thomas in dissent also agrees with Justice Kennedy on this crucial point:

> There are, we recognized, 'important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof.' In sharp contrast to a *civil* committee, an insanity acquittee is institutionalized only where 'the *acquittee himself* advances *insanity* as a defense and *proves* that his *criminal act* was a *product* of his *mental illness*' and thus 'there is good reason for diminished concern as to the risk of error.'[155]

In sum, *Foucha* establishes that the statute is not a constitutionally permissible assertion of the state's power of civil commitment because it doe not confine for treatment and control only those individuals who suffer from a mental illness and, as a result of such illness, are dangerous. Rather, speculation about "personality features" or types, together with conclusory allegations of dangerousness some time in the future, qualify a citizen under the statute for indefinite incarceration in a psychiatric prison. This is precisely the system of "confinements for dangerousness" explicitly forbidden by *Foucha*.

Moreover, any dispassionate analysis of the statutory scheme leads to the inevitable conclusion that the purpose of the law is not to provide treatment. Any rational treatment scheme would require involuntary treatment for the mentally ill soon after the alleged mental illness had first manifested itself in deviant behavior. The statute does not do this. Rather, it waits until the person is about to walk or has already walked out of the prison gates before it recognizes the

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154. *Foucha*, 112 S. Ct. at 1793 (Kennedy, J., dissenting) (citations omitted) (emphasis added).

155. *Id.* at 1800 (Thomas, J., dissenting) (quoting Jones v. United States, 463 U.S. 354, 367 (1983)) (emphasis added).

miraculous onset of mental disorder and the sudden need for treatment.

Additionally, as noted earlier, no solid and convincing evidence even suggests that involuntary treatment is effective in treating sex offenders or in reducing recidivism.[156] The Task Force and the legislature candidly acknowledged this central fact.[157] Even more disturbing is the so-called treatment now being provided for individuals committed under the predator commitment law. Each inmate is provided with about four hours of "group therapy" each week by staff members who have minimal educational and professional credentials and have no formal training in sex offender therapy.[158] A report by Dr. Vernon L. Quinsey on the treatment provided at the Special Commitment Center, where individuals committed under the law are confined, is extremely pessimistic about the treatment efficacy of the program.[159]

Michael Moore has spoken eloquently of the insidious impact the rhetoric of treatment may have on social practices of punishment. It is all too relevant here.

> [The] recasting of punishment in terms of "treatment" for the good of the criminal makes possible a kind of moral blindness that is dangerous in itself. As C. S. Lewis pointed out some years ago, adopting a "humanitarian" conceptualization of punishment makes it easy to inflict treatments and sentences that need bear no relation to the desert of the offender. We may do more to others "for their own good" than we ever allow ourselves to do when we see that it is really for our own good that we act.[160]

A candid statement by the legislature that preventive detention was the statute's purpose would surely have assured its constitutional demise in the courts. Honesty would have obstructed instrumental goals. Thus, creative characterization, such as "mental abnormality" and "treatment," and deliberately pejorative terms, such as "sexually violent predator,"

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156. *See supra* notes 55-67 and accompanying text.

157. *See supra* notes 141-42 and accompanying text.

158. Telephone interview with Jennifer Shaw, attorney for several inmates committed under this law (April 8, 1992).

159. *See* Vernon L. Quinsey, Review of the Washington State Special Commitment Center Program for Sexually Violent Predators (Feb. 1992) (unpublished manuscript on file with author). For excerpts from Quinsey's *Review*, *see infra* Appendix I.

160. MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 235 (1984).

were necessary to mask its real purpose and, hopefully, to insulate the statute from judicial scrutiny. In short, the legislature deliberately misused the medical model of therapy solely to achieve lifetime preventive detention.

C. Legal Rhetoric and Violence

The Task Force and the legislature deliberately employed incendiary language designed to ignite public anger and fear by using the phrase "sexually violent predator" in the statute. As already discussed, this key definitional term has no clinical or medical meaning. Additionally, the empirical literature on sex offenders fails to establish that such a type of sex offender exists, let alone that treatment is available to help them. Rather, legislators sought to evoke a loathsome and frightful zeitgeist that reinforced the public's fear that legions of sex offenders are at large who spend most of their time stalking their victims and committing heinous sexual crimes of violence.[161]

Robert Cover has poignantly pointed out that pejorative rhetoric in the law enables prosecutors, judges, and juries to justify more readily the terrible violence they inflict on fellow human beings.[162] The rhetoric used in the Washington statute is even more insidious. Persons committed under this law have been fully punished for their past crimes and, having paid their debt to society, are entitled under our constitutional system to their liberty. They have done nothing more to deserve indefinite psychiatric incarceration. And as I shall note later, they can do nothing to avoid incarceration under this law. A scarlet letter has been emblazoned on them for life, continually rending them candidates for lifetime imprisonment.

D. Constitutional Solutions

Legitimate and constitutionally acceptable methods exist for dealing with the danger posed by violent sex offenders. These include: (1) indeterminate sentencing;[163] (2) recidivist sentencing statutes that permit extended incarceration, includ-

161. Interestingly, many of the crimes which qualify an individual for commitment are not violent in the usual meaning of that word. For example, statutory rape in the second degree and indecent liberties against a child under age fourteen are qualifying crimes. *See* WASH. REV. CODE § 71.09.020(4) (Supp. 1990-91).

162. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

163. Specht v. Patterson, 386 U.S. 605 (1967).

ing lifetime imprisonment, for repeat sex offenders;[164] and (3) *bona fide* commitment for control and treatment as an alternative to punishment.[165]

Often legislative choices on public policy have constitutional consequences. In 1984, the Washington State Legislature chose to abolish prospectively the sexual psychopath program[166] and to adopt a determinate sentencing scheme that provided unconscionably short prison terms for serious repeat sex offenders.[167] Our constitutional system requires society to abide by the social compact embodied in the criminal law and to punish in accordance with that law. The new statute is a disingenuous attempt to preserve determinate sentencing while at the same time extending the prison terms for a few convicted sex offenders selected on an arbitrary and random basis.[168]

VI. THE REAL HARMS CAUSED BY THE STATUTE

Much more is at stake in this controversy than whether the state can confine indefinitely a few unlucky individuals in a psychiatric prison to appease public outrage over a heinous sex crime. If that were the only harm done by this law, those who care about our constitutional system of punishment and individual rights might be tempted to look the other way. Unfortunately, however, this law may cause much more serious harm.

A. The Teflon Slippery Slope

If upheld, this law will essentially permit a legislature to use lifetime preventive detention on any group of offenders who have served their prison terms and have been, or will be, released. All that is required to accomplish such a goal is a statute that labels criminals who have committed a single crime as suffering from a "mental abnormality" that makes them "likely to reoffend" and authorizes their lifetime confinement for "treatment." Simply put, the predator commitment

164. Rummel v. Estelle, 445 U.S. 263 (1980).

165. Allen v. Illinois, 478 U.S. 364 (1984).

166. WASH. REV. CODE ch. 71.06 (1989), *repealed prospectively by* 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).

167. 1981 Wash. Laws ch. 137 (codified at scattered sections of WASH. REV. CODE) (law became effective in 1984).

168. *See also* Scheingold et al., *supra* note 60 at 809-11.

law has detached involuntary commitment from the medical model of mental illness and *bona fide* treatment.

Once detached, literally no stopping point exists. The logic of the predator commitment law can be applied to people who drive while under the influence of alcohol, who assault their domestic partners or children, who use crack cocaine, or who commit whatever the new "crime-of-the-month" happens to be. Indeed, if mental abnormality, future recidivism, and the need for treatment can be deduced by the commission of a single past crime, the legislature is totally free to create what Justice Stevens aptly called a "shadow . . . criminal code."[169] Such a code can be invoked, not only as an alternative to crime and punishment, but as a way of extending punishment indefinitely.

Professor Jim Ellis raises the disturbing possibility that society might create "dangerousness courts" in which citizens are judged to be "dangerous" and in need of confinement even though they do not suffer from any form of mental illness or disability.[170] Indeed, no logical reason explains why even a single conviction is needed to commit a person as dangerous. Could gang members, perhaps selected on the basis of gender, age, and race be committed as dangerous?

Prophetically, James Boyd White has argued eloquently that misuses of the involuntary treatment model, like Washington's, are immoral:

> . . . [Under] a compulsory treatment system operated on the model of our present involuntary commitment practices, . . . [t]he basis for detention would be a judgment not about the blameworthiness of one's conduct but about the propensities of one's personality. . . . We would all be subject to compulsory detention when the interests of the public were judged to required it. This is unthinkable. It would expose every

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169. *See Allen*, 478 U.S. at 380, 384 (Stevens, J., dissenting):

> . . . nothing would prevent a State from creating an entire corpus of "dangerous person" statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and "criminal propensities," and constitutional protections for criminal defendants would be simply inapplicable. The goal would be "treatment"; the result would be evisceration of criminal law and its accompanying protections.

Id.

170. James Ellis, *Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of* Foucha v. Louisiana, 15 U. PUGET SOUND L. REV. 635 (1992).

> citizen to the incompetence, caprice, and corruption of coercive official action . . . [and] would define every citizen not as a free person with defined liberties, but as simply belonging to the bureaucratic state for its use. It would also abolish distinctions that are natural and important to us: the distinction, for example . . . between dangerous people who never act on their propensities and those who do . . . .[171]

B. The Law Is Counterproductive

Professors David Wexler and Bruce Winick have developed a powerful analytic perspective called "therapeutic jurisprudence" for use in evaluating mental health legislation.[172] In their view legal rules are social forces that can themselves produce therapeutic or anit-therapeutic consequences. Thus, policymakers should carefully consider sound social science evidence in determining whether a particular law has had a desirable or undesirable impact. The predator law has had a profound and emphatic anti-therapeutic impact.

As noted earlier, Washington provides treatment for many sex offenders on a voluntary basis while they serve their prison terms.[173] Offenders now in this treatment program have been notified that anything they say to their therapists may be used to commit them under the predator commitment law.[174] Because of this risk, many offenders may fail to participate in this treatment program or may fail to be fully candid with their therapists. The chilling effect of this new law risks destruction of the only real therapeutic program being offered to incarcerated sex offenders in our state. In the future, many offenders may be released from prison who did not receive the appropriate counseling and treatment they would otherwise have received. Some of them may commit crimes after they are released. Sadly, the predator commitment law may make Washington state a more dangerous place.

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171. WHITE, *supra* note 11, at 207.

172. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE (1990); DAIVD B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991).

173. *See supra* note 30 and accompanying text.

174. *See* Memorandum from Janet Barbour, Superintendent, Twin Rivers Corrections Center, to Inmates Participating in SOTP (Oct. 17, 1990) (copy on file with the *University of Puget Sound Law Review*) (notifying inmates in the sex offender treatment program that the Department of Corrections will, under appropriate circumstances, turn over their treatment files to prosecutors for possible use in predator commitment proceedings).

C. The Law Misuses Scarce Resources

At most, thirty-six beds are presently available in the facility to commit sexual predators. The facility was constructed and staffed at a cost of over one million dollars. Implementing the law will surely cost more than that each year if the full costs of maintaining and staffing the facility, as well as of conducting trials and appeals under the law, are taken into account. This money might have been better spent on other programs that have proven to be more effective in helping victims and preventing future sex crimes. Such efficacious programs include treatment for juvenile offenders, additional assistance to victims, and more prosecutors and prison cells. Already, some of these programs have been cut in these tight fiscal times.[175]

As a result of the past legislative session, the number of authorized beds at the Sex Offender Treatment Program at Twin Rivers has been reduced from 370 to somewhere between 170 and 200. Thus, a significant loss of up to 200 beds has been imposed on a treatment program that is considered very effective. Some treatment staff have been let go while others have found government employment elsewhere. This loss of resources means that, over a number of years, hundreds of convicted sex offenders will receive no treatment or will receive only truncated treatment while they serve their prison terms.[176] Surely, such a result is not a wise use of scarce resources.

Moreover, the law cannot even hope to successfully prevent future crimes if the predator commitment system does not accurately select and incarcerate those individuals who would reoffend if not committed. Undoubtedly, mental health professionals are extremely poor predictors of dangerous behavior. At best, they accurately predict dangerousness in only two out of five cases.[177] Professor Boerner reports that

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175. In light of recent budget cuts, officials decided in November 1991 not to fill eleven positions to treat juvenile sex offenders. Hal Spencer, *State Cuts Hit Safety, Welfare of Poor*, JOURNAL AMERICAN (Bellevue), Nov. 27, 1991, at A-7.

176. Telephone interview with Barbara Schwartz, Director, Sex Offender Treatment Program, Director, Sex Offender Treatment Program, Twin Rivers Corrections Center (Apr. 16, 1992).

177. *See* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); Robert J. Menzies et al., *Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pretrial Psychiatric Clinic, in* DANGEROUSNESS: PROBABILITY AND PREDICTION, PSYCHIATRY AND PUBLIC POLICY 115-44 (1985).

many studies indicate that predictions of dangerousness can be wrong eighty to ninety percent of the time.[178] Simply put, large numbers of sex offenders will have to be warehoused at great cost in order to have even a modest impact on reducing sex offenses.

VII. CONCLUSION

Why, then, has a law which is unconstitutional, expensive, ineffective, and counterproductive generated such passionate support? The probable answer is that it has acquired symbolic significance beyond its operational impact. In short, it has become a symbol of political power, crime prevention, and revenge.[179] In enacting this law, victims' rights groups have demonstrated their power to demand and obtain from the political process any crime control measure they want. The community has also signalled that it is willing to take whatever measures it believes necessary to prevent another story of "the little boy" from ever being told. In supporting such legislation, politicians can signify their responsiveness for constituents' concerns and insulate themselves from political attack. No politician wants to face a sixty-second political attack on television by his campaign opponent claiming "he voted against community safety and in favor of sexually violent predators."

Although the emotional support for the law is understandable as a matter of individual and group psychology, under our constitutional system, the power of the majority also has its limits. Once we tell singular stories to create generalized actors and actions and shamelessly exploit the power of narrative to construct a legal order based on inaccurate empirical knowledge, heedless of constitutional constraints and based on inaccurate empirical knowledge, we are at serious risk of losing the special vision of justice that is especially ours. In America,

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178. Professor Boerner wrote:

> All available evidence indicates that our ability to predict the occurrence of future criminal behavior is appallingly poor. When attempts are made to predict future violent crime, the subject of most concern, the results are worse. The best predictive techniques are accurate in no more than one-third of the cases and many studies have been wrong eighty to ninety percent of the time.

BOERNER, *supra* note 41, at 2-17.

179. *See generally* Joseph Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviancy*, 565 CAL. L. REV. 54, 58-59 (1968).

we punish a citizen for what he has done and not for what we think he may do.

Perhaps with the passage of time and the cooling of public passion, we will rediscover our first principles and our fundamental values. Perhaps too, we will even realize that we possess effective ways to safeguard our communities that do not make them even more dangerous.

APPENDIX I

[The following is an excerpt from Vernon L. Quinsey's unpublished manuscript, "Review of the Washington State Special Commitment Center Program for Sexually Violent Predators," dated February 1992.]

This review is based upon interviews with most of the professional staff associated with the Sexually Violent Predator Program, community-based clinicians who have served as consultant to the program, and three of the program "residents." In addition, I have examined the Sexually Violent Predator Commitment Statute (chapter 71.09, Revised Code of Washington) and written documentation concerning the Special Commitment Center.

Because the Sexually Violent Predator Program is very new, this review is primarily intended to facilitate future program development and to identify areas of concern.

There are both positive and negative aspects of the Sexually Violent Predator Program. On the positive side, the treatment staff appeared dedicated to their jobs and enthusiastic in their endorsement of the purpose of the sexually violent predator legislation; they are clearly eager to implement treatment programming, ever under exceptionally adverse circumstances. The staff are attempting to develop a state of the art cognitive-behavioral intervention and have had both the opportunity and resources to receive education and training from a variety of knowledgeable local resources and more distant resources (the Sexual Offender Treatment Program at Atascadero State Hospital). These training efforts are important and should be continued as the staff are, in general, not very experienced with the population.

It is, of course, impossible at present to appraise the Sexually Violent Predator Treatment Program both because it is at a very early stage of development and because there are at most only three residents who are actively engaged in treatment.

It is already apparent, however, that there are at least two very serious difficulties with the program as it stands. The first pertains to the Sexually Violent Predator Legislation itself and the second involves resident management and the manner in which the legislation has been implemented.

Sexually Violent Predator Legislation

Great uncertainty in engendered by the ambiguous constitutional status of the current commitment law. Many residents are simply waiting to see if the law will be declared to be constitutional. In a sense, everything is on hold until the legal issues are addressed more definitively.

Many jurisdictions have had experience with a variety of sexual psychopath or dangerous offender statutes. I have appended an example of the Canadian Dangerous Offender Legislation as an example of an alternative approach. However, most of these indeterminate sentencing laws are invoked at the initial trial stage instead of at the end of sentence or even after sentence expiry [sic], as in the present case. I take it as a given that a front end disposition is better for a variety of legal, ethical, and therapeutic reasons. The Sexually Violent Predator Legislation appears to be an interim attempt to remedy past lax initial sentencing and to provide interventions for those (presumably rare) offenders who may have become more dangerous during their sentence.

A large literature attests to the difficulty in implementing indeterminate sentencing laws effectively and fairly: There have been problems of geographical disparities in their application, differential application to the poor, inappropriate application (i.e., to nondangerous offenders), and lack of effective treatment for persons so sentenced. The special commitment statutes will have to overcome these difficulties as well as those arising from its back end application.

The nature of the Sexually Violent Predator Legislation is in itself not conducive to inspiring motivation for treatment among residents. Residents perceive the law to be arbitrary and excessive. This perception certainly appears justifiable in cases where residents have actually been on the street and have been recommitted without parole violation and/or have sought treatment while serving their regular sentence and been denied it for a variety of bureaucratic reasons (e.g., length of sentence). It is, of course, extremely difficult to form a therapeutic alliance with an embittered clientele.

This lack of motivation means that many residents will not engage in treatment; many spend most of their time in their rooms, pursuing litigation about a variety of issues. Quite clearly, many residents think that the only way they can

secure their release or at least, quick release, is through litigation.

Until some residents actually secure their release as a result of treatment induced changes, it will be extremely difficult to convince residents that a therapeutic release route is feasible.

The language of the commitment legislation does not induce therapeutic optimism. On the one hand, the preamble to the Special Commitment Statute asserts that persons who meet the sexual violent predator criteria require long-term treatment but are unlikely to be "cured," and, on the other, predicates release on a jury or court finding that the committed person's mental abnormality or personality disorder has changed such that the person is safe to be at large and, if released, will not engage in acts of sexual violence. It is, unfortunately, entirely unclear how a personality disorder can be changed through treatment because most of the defining features of personality disorder diagnoses (such as in DSM-III-R) are historical in nature.

However, it is possible to conclude that a resident's risk of committing a further act of sexual violence had been reduced, regardless of any change in mental abnormality or personality disorder. Such a conclusion, however, would best be arrived at in small steps from observations or progress in treatment and success under gradually reduced supervision. The present program has no provision for graduated release or post-release supervision; instead, decisions are to be made by a court on an all-or-none basis using information gained entirely from a high security (and very artificial) environment.

In my view, the lack of any provision for aftercare and community supervision is a fatal problem with the special commitment program as it stands now. It means that release decisions must be based solely on institutional behavior and that a relapse prevention approach to treatment cannot be effectively implemented. The inability to use measures of risk based on community behaviors to adjust the degree of supervision has to be rectified if treatment is to be effective and release decisions accurate.

In developing policies concerning the release of persons from the Sexually Violent Predator Program, it would be extremely helpful to be able to accurately estimate the numerical probability of their reoffending. Such actuarial estimates

of risk are extremely important in assessing the degree to which risk might be reduced through treatment or managed through supervision. These measures would be most precise if they were to be developed through follow-up research on sex offenders who have been released to the community in the State of Washington and could build on work done in other jurisdictions. Given such research, it would be possible to assess the level of risk presented by offenders with particular histories and personal characteristics under particular conditions of supervision. I have provided some discussion of these issues in the Appendix, together with a list of research articles by my colleagues and myself on the prediction of sexual and violent recidivism among offenders held under indeterminate conditions.

Resident Management

One quite worrisome observation made by both staff and residents was that a number of residents had accrued disciplinary infractions in the DSHS program who had never had disciplinary infractions while in DOC. This is likely to be a result of several factors: Resident bitterness concerning the indeterminate nature of their confinement and its imposition at the end of their sentence; excessive physical security and rule related security within the DSHS program; and inconsistent application of disciplinary rules, particularly across shifts. . . .

It was unclear to me why the internal and external level of security was as high as it was. This is the more worrisome because gradual reduction in security that would extend to community . . . supervision.

It was also unclear why offenders who are awaiting trial on the issue of their meeting the sexually violent predator criteria are mixed with residents who are in the Sexually Violent Predator Program for treatment. These trials are extremely aversive and stressful experiences for these men who, naturally, argue that they do not meet the criteria. One can imagine that, following commitment, these residents would be expected to recant their defense (admit to being sexually deviant and predatory) to the same staff who just had them committed. It is, therefore, good that there are separate evaluation and treatment staff teams. These functions should be kept as separate as possible. This separation of the staff functions, however, does not address the issue of missing the pre- and

post-trial offenders. It would be a small miracle if the anxiety, anger, and denial of pre-trial assessment cases did not corrupt whatever treatment motivation the post-trial residents have. Pre-trial and post-trial cases should be kept physically or, at least, programmatically separate.

Considerable thought must be given to the management of those residents who do not make sufficient progress to be released to the community. It is unrealistic to suppose that those residents will or should be engaged in full-time sex offender treatment programming for more than two or three years. Similarly, some residents will simply not opt to enter treatment. Many of these cases will likely not require high levels of internal security. Suitable long-term living arrangements for these men are required that afford appropriate opportunities for personal development (e.g., community college courses, trades training, recreation) under the least restrictive conditions. These conditions are those that best strike a balance between freedom of the resident and community safety. For most of these men, it is likely that secure perimeter security can be combined with considerable freedom within the institution.